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o. 84-836-CFH
tatus: GRANTED

Title: Daniel Vasquez, Warden, Petitioner
v.
Booker T. Hillery, Jr.

ocketed:
ovember 21, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Prahl,William George

Counsel for respondent: Tedmon,Clifford E.

ntry	Date	Note	Proceedings and Orders
1	Nov 21 1984	G	Petition for writ of certiorari filed.
2	Dec 5 1984		DISTRIBUTED. January 4, 1985
3	Dec 1 1984		Waiver of right of respondent Booker T. Hillery to respond filed.
4	Dec 20 1984	F	Response requested.
5	Jan 16 1985		Brief of respondent Booker T. Hillery in opposition filed.
6	Jan 16 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Jan 23 1985		REDISTRIBUTED. February 15, 1985
9	Feb 25 1985		REDISTRIBUTED. March 1, 1985
10	Mar 4 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Powell OUT.
11	Mar 4 1985		Petition GRANTED. Justice Powell OUT.
			**********
12	Mar 18 1985	G	Motion of respondent for appointment of counsel filed.
13	Mar 25 1985		DISTRIBUTED. Mar. 29, 1985. (Motion of respondent for appointment of counsel).
14	Apr 1 1985		Motion for appointment of counsel GRANTED and it is ordered that Clifford Earl Tedmon, Esquire, of Sacramento, California, is appointed to serve as counsel for the respondent in this case.
15	Apr 11 1985		Order extending time to file brief of petitioner on the merits until May 18, 1985.
17	May 20 1985		Joint appendix filed.
18	May 20 1985		Brief of petitioner Vasquez, Warden filed.
19	May 30 1985		Record filed.
20	May 30 1985		Certified original record & C.A. proceedings, volumes I thru IV, received.
22	May 31 1985		Order extending time to file brief of respondent on the merits until July 19, 1985.
23	Jul 12 1985		Brief of respondent Booker T. Hillery filed.
24	Jul 18 1985		SET FOR ARGUMENT, Tuesday, October 15, 1985. (4th case).
25	Jul 18 1985	G	Motion of NAACP Legal Defense & Educational Fund, Inc. for leave to file a brief as amicus curiae filed.
26	Aug 7 1985		CIRCULATED.
27	Sep 18 1985		Motion of NAACP Legal Defense & Educational Fund, Inc. for leave to file a brief as amicus curiae GRANTED.
28	Oct 15 1985		ARGUED.

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84-836 (1)

FILED
NOV 21 1984

No. 84-

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

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58 pp

QUESTIONS PRESENTED

1. Was it error for the District Court to apply a rule of Per Se reversible error to a case of discriminatory grand jury selection where there is overwhelming evidence of the defendant's guilt and where the defendant received a full and fair trial?

2. Did respondent fail to exhaust his available state remedies by significantly changing the evidentiary basis of his claim for relief without ever presenting this new evidence to the state courts?

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No. [illegible]-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

DANIEL VASQUEZ, the Warden of San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The unreported majority and dissenting opinions of the Ninth Circuit Court of Appeal affirming an order of the United States District Court for the Eastern District of California were filed on May 14,

1984. These opinions are reproduced as Appendix "A." A timely petition for rehearing and a suggestion for rehearing en banc was thereafter field in the Ninth Circuit Court of Appeal. That court filed an order denying rehearing on September 12, 1984. The opinion is reproduced as Appendix "B."

JURISDICTION

Petitioner asserts jurisdiction under 28 United States Code section 1257(e).

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

The Grand Jury of Kings County returned an indictment on June 27, 1962, charging respondent Booker T. Hillery with a violation of California Penal Code section 187 in that on or about the 21st of March, 1962, respondent did willfully, unlawfully,

and feloniously murder Marlene Miller (CT 1). [1]

On July 16, 1962, respondent, through his attorney, made a motion to quash the indictment. The motion alleged that members of respondent's race had been systematically and purposely excluded from the Grand Jury which indicted him (RT 26, 28).

Respondent's motion was heard, considered, and denied on July 31, 1962 (CT 41).

On November 16, 1962, the jury returned a verdict of guilty as to the charged offense and fixed the degree at first degree murder (CT 75). On November 20, 1962,

1. Hereafter "CT" refers to the Clerk's Transcript prepared in connection with the appeal of respondent's first state court trial; "RT" refers to the Reporter's Transcript prepared in connection with the appeal of respondent's first state court trial; "CR" refers to the Clerk's Record for the Ninth Circuit appeal in this case.

the jury returned a verdict fixing respondent's penalty at death (CT 132).

On November 26, 1962, the court imposed a judgment of death (CT 145).

An automatic appeal to the California Supreme Court followed pursuant to section 1239(b) of the Penal Code.

On May 3, 1965, the California Supreme Court filed an opinion affirming the guilt phase of respondent's trial but reversed imposition of the death penalty. (People v. Hillery (1965) 62 Cal.2d 692.)

Respondent was to be subsequently given to additional penalty trials with each resulting in imposition of a death sentence. (See People v. Hillery (1967) 62 Cal.2d 795, cert. en., 87 S.Ct. 958 (1967); In re Hillery (1969) 71 Cal.2d 857; People v. Hillery (1974) 10 Cal.3d 897.)

In January of 1978, respondent filed a habeas corpus petition in the Marin

County Superior Court alleging that blacks had been excluded from the grand jury which indicted him (CR 1). Respondent relied upon the record of his original motion to quash to support his claim of purposeful discrimination.

In March of 1978, respondent filed a petition for writ of habeas corpus in the First District Court of Appeal and in April of 1978 respondent filed a petition for a writ of habeas corpus in the California Supreme Court (CR 1). On each occasion, respondent did not offer any new evidence and instead relied on the record of his original trial.

The instant petition was originally filed in the United States District Court for the Northern District of California on May 22, 1978 and was later transferred to the Eastern District. In the original petition, respondent again relied upon the state court

record and did not seek an evidentiary hearing in federal court.

On August 7, 1980, the District Court issued a published order denying petitioner's various dispositive motions (CR 21). (Hillery v. Sumner (E.D. Cal. 1980) 496 F.Supp. 632.)

On November 10, 1981, petitioner field a notice of motions and motions for dismissal of petition for failure to exhaust as to the newly discovered and recently produced evidence and for summary denial of the petition (CR 36).

On March 9, 1982, the District Court filed a published opinion denying the state's motion. The court held, inter alia, that respondent's allegations were sufficient to support a prima facie case and to preclude the summary dismissal of the petition (CR 39). (Hillery v. Pulley (E.D. Cal. 1982) 533 F.Supp. 1189.)

On May 12, 1983, the District Court issued its published 54-page opinion granting the petition for a writ of habeas corpus (CR 56). (Hillery v. Pulley (E.D. Cal. 1983) 563 F.Supp. 1228.)

STATEMENT OF PERTINENT FACTS

A. Facts of the Offense

While the facts of the offense may not initially seem relevant to respondent's contention regarding the selection of the 1962 King County Grand Jury, there is case law and commentary which suggests that a habeas corpus petitioner's guilt may not be a totally irrelevant consideration. 2/

A detailed factual account of the offense may be found in the 1965 opinion of the California Supreme Court in People v.

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1. See Friendly, Is Innocence Irrelevant? Collateral Attach on Criminal Judgments, 38 U.Chi.L.Rev. 142, 170; United States ex rel. Barksdale v. Blackburn (5th Cir. en banc, 1981) 635 F.2d 1115.)

Hillery, supra, 62 Cal.2d 692 which affirmed the guilt phase of respondent's state court conviction but which reversed his death penalty sentence.

The guilt phase of respondent's trial was not reviewed again on direct appeal but two subsequent death penalty judgments were overturned and respondent's third death sentence was finally commuted to life imprisonment by virtue of the California Supreme Court's decision in People v. Anderson (1972) 6 Cal.3d 628.

A review of these facts makes it virtually impossible to entertain any doubt whatever that respondent brutally murdered fifteen-year-old Marlene Miller while he was on parole from an earlier forcible rape conviction. Three separate juries have arrived at this conclusion, including one in Kern County where the matter was tried

because of a change of venue. (See People v. Hillery, supra, 10 Cal.3d 897.)

B. Facts Produced at Respondent's Original State Court Motion to Quash the Indictment

Respondent raised the issue of systematic exclusion of black persons from the grand jury which had indicted him in a pretrial motion to set aside the indictment pursuant to California Penal Code section 995 which was dated July 16, 1962 (CT 11, 23, 26; RT 15). Supporting and opposing affidavits were filed and an evidentiary hearing and arguments were held on July 16 and 31, 1962 (CT 28-41; RT 6, 15). All of the material from the state court record which relates to respondent's motion to quash was provided to the District Court in connection with the petition for federal habeas corpus relief.

In his direct appeal from the judgment of conviction, respondent challenged the trial court's ruling on his motion to

quash. In affirming this conviction, the California Supreme Court made a series of factual findings which petitioner now contends are binding on the federal courts pursuant to Sumner v. Mata (1981) 449 U.S. 539.

The California Supreme Court specifically found that:

> "Defendant [respondent] sought to prove that no Negro had served on a Kings County grand jury since 1893, the year in which the county was organized. The People did not dispute this fact, but introduced evidence based on official census records establishing that in 1960 Negroes constituted only 5.1 percent of the total population of Kings County, and that prior to World War II the proportion had been 1 percent or less. It was also shown that Negroes had often served on petit juries in Kings County (and defendant does not complain of the fact that there was no Negro on the jury that tried and convicted him). The county clerk testified that it was her duty to check the proposed grand jury list against the voters' registration affidavits to determine whether any persons therein named were disqualified by statute, but that

such affidavits bear no indication as to the race of the voter; she further testified that during her tenure in office (since 1953) no member of the board of supervisors or judge of the superior court had ever requested her to determine the race of a prospective grand juror.

"In the court of the hearing on the motion to quash, the trial judge spoke at length on the subject of his method of selecting grand juries since he took office in 1956, and subsequently ordered that such statements be considered as his testimony. He said that in selecting a panel he 'always endeavors on each one of those [judicial] districts to get a good cross section of people who will be qualified to serve as Grand Jurors'; that he had consistently 'tried to get a distribution of racial descents, tried to get both sexes represented, tried to get occupations, farmer [sic], business men and various other types so it will be real -- a real representative group of people, of the better type'; and that since 1956 he had not had a Negro on the panel 'not through lack of desire, but purely through lack of ability to find one that the Court feels would make a proper Grand Juror.' The judge pointed out that he had previously asked defendant's counsel to suggest the names of Negro residents who might be qualified to serve, and had

considered selecting a Mr. Lloyd Welcher but declined to after determining that the duties would interfere with the latter's regular employment. Finally, it was shown that in Kings County 'rarely is any of the grant jury's time devoted to hearing evidence of criminal offenses,' and that in the decade evidence of criminal offenses,' and that in the decade ending in 1962 more than 1,000 prosecutions were initiated by information while four were initiated by indictment and only one of the later was against a Negro." (People v. Hillery, supra, 62 Cal.2d at pp. 709-710.)

Kings County was formed in 1893 and had only one superior court judge. Judge Meridith Wingrove took the bench in 1956, and was on the bench in 1962 when respondent was indicted.

From 1900 until 1962 either California Code of Civil Procedure (CCP) section 206, or California Penal Code (Pen. Code) section 899, required that the superior court apportion its grand jury selections according to the population of the county's four judicial districts.

Until 1915 the statutory qualifications for grand jury service included a requirement of property ownership. (CCP § 198.)

Until 1972 it was a requirement for grand jury service that a person be 21 years of age. Until 1920 grand jury service was limited to males.

From 1915 until 1962 it was a requirement that a person be a resident of the state and county for one year before being eligible for grand jury service. (CCP § 198.) There were also disqualifications because of the conviction of a felony and because of a lack of United States citizenship. (Pen. Code, § 893.) To be eligible for grand jury service persons had to have sufficient knowledge of the English language and had to be of ordinary intelligence. (CCP § 198.) Persons serving on the grand jury were to be of fair

character, approved integrity, and had to have sound judgment. (Pen. Code, § 897.) Persons who had served on a grand jury during the previous year and those service on trial juries were also disqualified from grand jury service. (Pen. Code, § 893.)

There were also a number of statutory exemptions from grand and trial jury service which included ministers of the gospel, teachers, mail carriers, military personnel, and certain railroad employees. (CCP § 200.)

Grand jury service in California is for one year with only one grand jury being impaneled in the county each year. The grand jury in California performs both civil and criminal functions. In its role as a "watchdog" of county government, the grand jury investigates the various functions of county government and issues a comprehensive yearly report which details its findings and

often included recommendations for changes. (See 20 U.C.L.A. L.Rev. 581 (1973).)

C. Facts Produced at the Federal Evidentiary Hearing

Over the State's strenuous objections, the District Court conducted an evidentiary hearing on April 28-29 of 1982. To accommodate two elderly witnesses who had hardships, the court allowed the testimony of these witnesses to be taken by deposition.

The evidentiary hearing conducted in this matter reaffirmed the State's earlier assertions that any attempt to try a 20-year-old factual dispute would be virtually impossible.

Three of the witnesses respondent called at the federal evidentiary hearing were older black people who had been long-time residents of Kings County. Each of these witnesses had previously submitted declarations under penalty of perjury

attesting inter alia to the fact that they knew the qualifications for grand jury service and knew there were black persons in Kings County who met these qualifications. However, when they testified in person each said they did not knew the qualifications for grand jury service.

These witnesses testified that black people had served on the county's trial juries. There was also testimony that black people served on trial juries before petitioner's 1962 indictment. Each witness acknowledged that prior to the late 1940's, the Kings County black population was extremely small. Before the second world war, blacks were generally involved in farm work and traveled throughout the county to get jobs. Prior to the late 1940's most of the black people in Kings County lived on farms spread throughout the county. After the postwar influx of blacks into the county,

the urban population of blacks grew, primarily in the county's largest city, Hanford.

One of the attorneys in the firm representing respondent in the federal proceedings testified that he selected certain census data from each decennial census from 1900 through and including 1960 which he felt estimated the population of eligible blacks in Kings County.

For the critical two decades of 1960 and 1950, respondent's counsel had to estimate the population of blacks over 21 years old in Kings County since "a breakdown of black males and black females age 21 and over was not available."

Respondent also presented the testimony of a forensic actuary, Mr. Parkyn, who performed a sophisticated computer analysis of the census data provided to him by respondent's counsel. Mr. Parkyn testified that, based on his computer analysis, there

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was very little probability that 62 all non-black grand juries could have been selected in Kings County from 1900 until 1962.

Although means were available to do so, Mr. Parkyn did not interpolate each decennial census but instead used a constant figure for each of the ten years within the decade.

Most importantly, Mr. Parkyn testified that his analysis could not prove intent but merely proved probability. Furthermore, Mr. Parkyn testified that only 19 black persons would have served throughout the 62 years between 1900 and 1962 if the selection system had been perfectly random.

Based on this sketchy and newly developed evidence, the District Court reversed a twenty-year-old first degree murder conviction supported by three separate jury verdicts.

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ARGUMENTS

I

IT WAS ERROR FOR THE DISTRICT COURT TO APPLY A PER SE REVERSIBLE ERROR RULE TO A CASE OF PURPOSEFUL DISCRIMINATION WHERE THERE IS OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT AND WHERE THE DEFENDANT RECEIVED A FULL AND FAIR TRIAL

In the recent case of Connecticut v. Johnson (1983) ___ U.S. ___, 103 S.Ct. 969 this Court examined the doctrine of "harmless error" as it applies to state criminal prosecutions. In Johnson this Court cited its earlier opinion in Chapman v. California (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705, with approval. The Johnson court noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" Connecticut v. Johnson, supra, 103 S.Ct. at 975 (emphasis added).

This Court then went on to note the instances where a violation of a criminal defendant's constitutional rights can not be considered to be harmless error. The cases cited included: Gideon v. Wainwright (1963) 372 U.S. 335 (right to counsel at trial); Payne v. Arkansas (1958) 356 U.S. 560 (coerced confession); Tumey v. Ohio (1927) 273 U.S. 510 (impartial judge). Each case dealt with the fairness of the trial which the defendant had received.

Chapman, however, also established the rule that "some constitutional errors may be considered harmless if the beneficiary of the error "proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

The District Court in the instant case adopted and applied a rule of per se reversal for cases involving purposeful

discrimination in the selection of grand juries.

However, the court in Chapman, supra, 386 U.S. at 21 rejected the argument that "all federal constitutional error, regardless of the facts and circumstances, must always be deemed harmful."

The danger of a discriminatorily selected grand jury is that its evaluation of the evidence against a defendant may be biased, resulting in an unfounded charging document being filed against him. There is also a danger of an otherwise unnecessary public trial where, if the bias continues, a defendant may be wrongly convicted. However, where the only contention of impropriety in the entire process resulting in a defendant's conviction relates to the selection of the grand jurors, the indictment is not necessarily erroneous, and most importantly, the validity of the trial is unaffected. As

in Fourth Amendment cases, the retrospective focus on the grand jury selection process distracts attention from the crucial inquiry of whether the petitioner has had a fair and unbiased trial wherein an appropriately constituted trial jury has found him guilty beyond any reasonable doubt. (See Stone v. Powell (1976) 428 U.S. 465, 490.) Moreover, once the state trial and appellate courts have considered and ruled on a petitioner's claim of discriminatory grand jury selection, any potential for unconstitutionality in an individual case has been investigated and negated.

The dissenting opinion in Castaneda v. Partida (1976) 430 U.S. 482, 508, while noting that the issue was not before the court at that time, points out that a "strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after Stone v. Powell. . . ."

Three justices support this statement with reference to the Stone rationale, which they conclude is even more pertinent in grand jury discrimination cases:

> "Unlike the prisoner in Stone, who could complain that his conviction rested on evidence tainted by Fourth Amendment violations and could ask for a new trial with that evidence excluded, the prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself. As in Stone, the incremental benefit of extending habeas corpus as a means of correction unconstitutional grand jury selection procedures might be viewed as 'outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.'" (Castaneda v. Partida, supra, p. 508, fn. 1.)

In an apparent response to Justice Powell's dissent in Castaneda, supra, Justice Blackmun wrote in Part II of his opinion in Rose v. Mitchell (1979) 443 U.S. 545 that a claim of racial discrimination in the selection of grand jury foremen presented an

issue cognizable on habeas corpus regardless of the guilt or innocence of the petitioner, and regardless of whether the state had previously granted a full and fair hearing on the petitioner's claim.

At least one federal court has indicated that Part II of the Rose opinion may not have any precedential value since:

> ". . . Part II of Justice Blackmun's opinion was joined by only two justices who joined in the judgment of the Court and by two dissenters (Justices White and Stevens), leading Justice Powell to question its precedential value 'for not all of the four Members who join in support even the Court's judgment.' Rose v. Mitchell, supra, 443 U.S. at 582, n. 3, 99 S.Ct. at 3014, n. 3 (Powell, J., concurring). Since 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds,' Gregg v. Georgia, 428 U.S. 153, 169, n. 15, 96 S.Ct. 2909, 2923, n. 15, 49 L.Ed.2d 859 (1976), Justice Powell's point is well taken." (United States ex rel. Barksdale v. Blackburn, supra, 639 F.2d at 1120.)

In Barksdale, supra, Circuit Judge Ainsworth also held that even if Part II of Rose is part of the holding of the Court, it may still not be dispositive in all jury discrimination cases. (Id.)

When the recent drastic changes in the scope of federal habeas corpus relief are combined with the unique circumstances of the instant case, it becomes clear that respondent is not entitled to a reversal of his conviction simply because the district court found that there may have been some discrimination in the selection of the grand juries in Kings County from 1900 until 1962.

For example, the instant case is distinguishable from Rose since there is affirmative and uncontested evidence that black persons regularly served on trial juries in Kings County before 1962. Furthermore, there is also evidence in this case that blacks served on grand juries

during the 20 years after respondent's indictment.

The charging process in California is also markedly different from that of Tennessee where all criminal prosecutions must begin with an indictment. (Rose v. Mitchell, supra, at p. 548, n. 1.) In California a vast majority of prosecutions are initiated by the complaint process which relies upon a preliminary hearing for a finding of probable cause to conduct a trial. In 1962 the Kings County Grand Jury was even less involved in the charging process than the average California grand jury.

This distinction is important since one of the primary reasons expressed by Justice Blackmun for rejecting application of the harmless error rule to grand jury cases was his understanding of the role played by the indicting grand jury in Tennessee. See

Hobby v. United States, ___ U.S. ___, 104 S.Ct. 3093 (1984).

California's position on the applicability of the harmless error rule to cases of purposeful discrimination in grand jury selection is neither novel nor is it an attempt to ignore the constitution. For example, Mr. Justice Jackson first endorsed this argument more than thirty-five years ago in his dissent in Cassell v. Texas (1950) 339 U.S. 282, 298. More recently, Justices Stewart and Rehnquist agreed with this argument in their dissent in the case of Rose v. Mitchell, supra, 443 U.S. 545, 574. In United States ex rel. Barksdale v. Blackburn, supra, 639 F.2d 1115, the Fifth Circuit recognized the distinct possibility that unless grand jury discrimination is accompanied by petit jury discrimination "such grand jury discrimination might be harmless error." Finally, in the recent case

of Hobby v. United States, supra, this Court held that discrimination in the selection of federal grand jury foremen does not always require reversal of a conviction if the defendant has received an otherwise fair trial.

In the instant case the district court refused to consider the question of whether this particular error could be considered harmless for two reasons. First, the district court felt that application of a "per se reversible error standard" was necessary for deterrent purposes. Second, any application of the harmless error rule was rejected to protect the integrity of the judicial process.

Granting the instant petition for a writ of certiorari is necessary to correct what amounts to an exceptional legal error.

The record in the instant case contained undisputed facts which have

significance aside from the numbers of blacks who did not serve on the Kings County Grand Jury. Here, there is no assertion of petitioner's factual innocence. Respondent does not claim that he did not brutally murder Marlene Miller. Three separate juries heard the evidence of respondent's guilt and none of them found that Hillery deserved anything less than death for what he had done. Respondent does not claim that the evidence presented to the grand jury was insufficient to bind him over for trial. In fact, the prominent black attorney who represented Hillery at trial admitted that there was no question in his mind that respondent would have been bound over for trial had the indictment been quashed and had he received a preliminary hearing. More importantly, there is no claim here that respondent did not receive a fair trial or that blacks had been systematically excluded

from trial juries in Kings County. Furthermore, there is no claim of continuing discrimination in this case, and any deterrent purpose purportedly served by reversing this judgment is therefore meaningless. To the contrary, there is affirmative evidence which the District Court all but ignored which indicated that remedial measures to correct the exclusion of blacks from the grand jury had already been initiated before Hillery was indicted.

Realistically, the integrity of our judicial system is not threatened by the process Kings County used to select its grant jury more than twenty-five years ago. However, the reversal of three different jury verdicts, each returned after a fair trial, all of which are supported by overwhelming evidence of petitioner's guilt, does little to enhance the integrity of the judicial process.

When the totality of those facts are considered, it become unerroringly clear that the People of the State of California have suffered a substantial injustice with the reversal of respondent's 20-year-old first degree murder conviction without any showing that the exclusion of blacks from the grand jury affected the fairness of respondent's trial and in the absence of any assertion of respondent's innocence.

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II

RESPONDENT FAILED TO EXHAUST HIS AVAILABLE STATE REMEDIES SINCE HE SIGNIFICANTLY CHANGED THE EVIDENTIARY BASIS OF HIS CLAIM FOR RELIEF WITHOUT EVER PRESENTING THIS NEW EVIDENCE TO STATE COURTS

To support his claim of systematic exclusion of blacks from the Kings County grand jury, respondent relied primarily upon evidence which was never presented to any of the state courts which have previously been asked to review his claim for relief. In doing so, respondent violated 28 United States Code section 2254 which expressly requires exhaustion of available state remedies.

In his dissent in this case Circuit Judge Anderson concludes that:

> "Although petitioner's basic claim has remained the same, the evidentiary basis for that claim changed significantly in the present habeas corpus proceeding from that presented to the state courts years ago." (9th Cir. opinion, 5/14/84; attached hereto as Appendix "B.")

In rejecting the state's argument on this issue, the majority ignored a substantial body of relevant and binding precedent.

For example, the case of Zicarelli v. Gray (3rd Cir. 1976) 543 F.2d 466 is directly on point and supports the state's position on this issue. (See also Zicarelli v. Dietz (3rd Cir. 1980) 633 F.2d 312, cert. den. 101 S.Ct. 868.)

In the remarkably similar case of Zicarelli v. Gray, supra, 543 F.2d 466, the court held that:

> "For a court to determine a claim that a defendant has not been tried by a jury reflecting a cross-section of the community where the crime was committed, it must be apprised not only of the legal contention, but also of the demographic data supporting the contention. Zicarelli did not make such a proffer to the trial court, nor did he state to the appellate courts that he was ready to present such information to the trial court if the cause was remanded for such purposes. Indeed, the first clear reference to the demographic data was made in Zicarelli's brief that was filed in the federal court to support his petition for habeas corpus."

The court in Zicarelli v. Gray, supra, went on to dismiss the petitioner's cross-section claim and required the petitioner to exhaust this issue in the state courts. (See Zicarelli v. Dietz, supra, 633 F.2d 312, cert. den., 101 S.Ct. 868.)

This same rule applies in those cases where the habeas petitioner has presented some supporting facts to the state courts but has later asserted different and more compelling factual allegations to the federal courts. (See, e.g., Gurule v. Turner (10th Cir. 1972) 461 F.2d 1083, 1084.)

A rule requiring exhaustion has been endorsed by the Fifth Circuit Court of Appeals in Knoxson v. Estelle (5th Cir. 1978) 574 F.2d 1339. In Knoxson a state prisoner was denied habeas relief by the district

court. After oral argument and submission of the case to the district court, petitioner filed a post-submission brief which contained factual material which had never been presented to the state courts.

The Circuit Court of Appeals held that:

> "The post-submission brief does contain new factual allegations in support of Knoxson's legal plea. With regard to these new facts, we believe that the petitioner has failed to exhaust his state remedies. His petition must be dismissed from the federal court without prejudice to give the state court an opportunity to review these newly surfaced facts in the further proceedings that we expect Knoxson to pursue. See Picard v. Connor, 1971, 404 U.S. 270, 276, 92 S.Ct. 509, 30 L.Ed.2d 438; United States ex rel. Boodie v. Herold, 2 Cir. 1965, 349 F.2d 372; Gurule v. Turner, 10 Cir. 1972, 349 F.2d 372; Gurule v. Turner, 10 Cir. 1972, 461 F.2d 1083; Developments in the Law--Habeas Corpus, 73 Harv.L.Rev. 1038, 1069 (1970) ('. . . evidence . . . clearly crucial to the claim . . . should first be presented to the state if the exhaustion rule is to be an effective one')."

> "This Court believes that the interests of the state of Texas, the federal courts, and the petitioner are best balanced by allowing the state courts to consider this evidence. We therefore vacate the District Court's denial of habeas relief and remand to the District Court with directions to dismiss the suit without prejudice to Knoxson's right to refile the petition if he is dissatisfied with the outcome of any proceedings he brings in the state court." (Emphasis added; see also Paullett v. Howard (3rd Cir. 1980) 634 F.2d 117.

More importantly, the majority opinion in the instant case appears to be in direct conflict with earlier precedent decided by 9th Circuit itself.

Thus, in Daniels v. Nelson (9th Cir. 1972) 453 F.2d 340, 342, this Court held that:

> "Thus the claim made before the California court and the claim now made can both be said to be that the confession was involuntary. However, the substance of the claim now made is quite different from the substance of the claim made before the California court. As we stated in

Schiers: '[i]t is now wholly transformed by other factual assertions of the petitioner into quite a different problem.' To sustain the present claim, Daniels would have to offer evidence that does not appear in the record made in the state courts, that is, evidence that the police officer promised to release his family if he confessed. Under these circumstances, we agree with the trial court that the question now presented as to the voluntariness of Daniels' confession should be first presented to the California Courts." (See also Schiers v. People of the State of California (9th Cir. 1964) 333 F.2d 173, 175-176.)

In the instant case, respondent argued that "throughout the entire proceedings in state and federal court, petitioner has alleged systematic exclusion of blacks in the grand jury process in Kings County." (CR 37, p.5.)

The State does not dispute this assertion. The problem with respondent's analysis is that it is far too shallow. While respondent's basic claim has remained

the same, the evidentiary basis of that claim changed dramatically after it was filed in the federal court.

Instead of relying on the evidence introduced in the state court almost twenty years ago, respondent now relies upon what he claims is a sophisticated computer analysis of the statistical probability that blacks would not have served on the Kings County Grand Jury had the selection been random.

Respondent was also allowed to introduce census material not introduced at the state court trial as well as introducing the testimony of several purported witnesses who did not testify at the original motion to quash which was conducted more than twenty years ago.

Thus, while respondent's generic claim has remained the same, the species of his claim has been drastically mutated into a wholly different animal.

It is not necessary that there be an entirely new and different legal contention raised to justify sending a case back to the state courts under section 2254(b). It is sufficient if the new factual allegations are simply "more compelling." (Gurule, supra.) Where the new factual material "wholly transforms" the case or "materially changes" it, the matter must be returned to the state courts. Here, the district court erred in denying the state's motion to dismiss the petition without prejudice and the district court's order granting the writ must therefore be reversed.

- - - - - -

CONCLUSION

The majority opinion in this case which affirms the judgment of the District Court is just another step down a dismal and dark road discounting the value of human life. Here, a first degree conviction has been reversed. The conviction has not been reversed because there is any question of Mr. Hillery's innocence. Far from it, the evidence of Hillery's guilt is overwhelming and uncontraverted.

Nor has Hillery's conviction been reversed because he failed to receive a full and fair trial.

Instead, this particularly vicious and particularly heinous murder has been reversed because black persons had supposedly been purposefully excluded from serving on grand juries in Kings County twenty-five years ago.

However, black persons had regularly served on trial juries in Kings County and were in the process of being selected for the grand jury.

Under the compelling facts of this case, fairness and justice to the victim of Hillery's brutality and to her still grieving family must count for something. There must be some balance, some symetry, some harmony within the constitution. No document with such a noble purpose compels such an ignoble result. No document which seeks to protect the highest values of human existence such as life and liberty can be used to set aside Hillery's inhuman act of violence.

It is no consolation to talk of retrials. Even if a retrial is possible, it will only serve to rekindle the grief, suffering and agony of a family who have already suffered too much. A retrial would clothe petitioner in the presumption of

innocence and would only further erode the public's confidence in an already suspect criminal justice system.

This is a case which desperately cries out for a just result and the granting of this petition for a writ of certiorari to achieve such a purpose.

For the foregoing reasons, petitioner requests that a petition for a writ of certiorari be granted and that the judgment of the district court granting petitioner's application for a writ of habeas corpus be reversed.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

WILLIAM G. PRAHL
Deputy Attorney General

Attorneys for Petitioner

WGP:gmm
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APPENDIX A

(FOR PUBLICATION)
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOOKER T. HILLERY, JR.,	)	No. 83-2017
	)	
Petitioner-Appellee,	)	D.C. No.
v.	)	CV S-78-594 LKK
	)	
REGINALD PULLEY, Warden,	)	
	)	ORDER
Respondent-Appellant.	)	
	)	

Appeal from the United States
District Court For the
Eastern District of California

Honorable Lawrence K. Karlton,
District Judge, Presiding

Submitted April 12, 1984

Before: ANDERSON and SCHROEDER, Circuit Judges, and EAST,* District Judge

In this matter, petitioner Booker T. Hillery, Jr., successfully challenged the constitutionality of his 1962 Kings County Superior Court judgment of conviction and sentence for the stabbing murder of a

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

fifteen-year-old girl, in violation of California Penal Code section 187, by applying for a writ of habeas corpus in the District Court. The District Court granted the writ upon concluding that petitioner's conviction resulted from a denial of equal protection because black persons had been systematically excluded from selection to the Kings County grand jury for the years preceding his 1962 indictment.

We affirm upon the basis and for the reasons set forth in the excellent and extensive District Court opinion granting the application. Hillery v. Pulley, 563 F.Supp. 1228 (E.D. Cal. 1983). See also Hillery v. Pulley, 533 F.Supp. 1189 (E.D. Cal. 1982) denial of government's motion to dismiss for failure to exhaust); Hillery v. Sumner, 496 F.Supp. 632 (E.D. Cal. 1980) (denial of government's motion to dismiss for prejudicial delay).

The judgment of the United States District Court granting petitioner's application for writ of habeas corpus is AFFIRMED.

The matter is REMANDED to the District Court for issuance of the writ and other appropriate order.

The state may seek to recharge and try petitioner again by the procedure which conforms to constitutional requirements.

DISSENT

HILLERY v. PULLEY - No. 83-2017

J. BLAINE ANDERSON, Circuit Judge, dissenting:

I respectfully dissent from the court's order affirming the district court.

In my view, petitioner has failed to exhaust his state remedies as required by 28 U.S.C. section 2254(b), Picard v. Conner, 404 U.S. 270, 275-76 (1971), and Rose v. Lundy, 455 U.S. 509 (1982). The testimony of an expert "forensic actuary" presenting a new theory of statistical analysis is, in spite of the characterization by petitioner, new evidence that has not been presented to the state courts. This "new method" is new evidence supporting a new theory.

Nor do I agree that the affidavits of three witnesses establishing the competency of black persons to serve as grand jurors are properly characterized as "cumulative." The same may be said of the new census material.

Although petitioner's basic claim has remained the same, the evidentiary basis for that claim changed significantly in the present habeas corpus proceeding from that presented to the state courts years ago.

We should vacate the district court's order with instructions to dismiss the petition without prejudice.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOOKER T. HILLERY, JR.,	)	No. 83-2017
	)	
Petitioner-Appellee,	)	D.C. No.
v.	)	S-78-594 LKK
	)	
REGINALD PULLEY,	)	
	)	ORDER
Respondent-Appellant.	)	
	)	

Before: ANDERSON, SCHROEDER, and EAST, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

(6)

ORIGINAL

Supreme Court, U.S.
FILED
JAN 16 1985
ALEXANDER L. STEVAS
CLERK

RECEIVED

NUMBER 84-836

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

DANIEL VASQUEZ, the Warden of San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, BOOKER T. HILLERY, pursuant to Rule 46(1), Supreme Court Rules, and Title 18 U.S.C. section 3006A(d)(6), asks leave to file the attached Response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis.

Petitioner qualified for appointment of counsel under the Criminal Justice Act and attorney Clifford E. Tedmon of the Law Offices of Tedmon and Tedmon was appointed to represent him in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit. Attorney Clifford E. Tedmon has represented respondent at all stages of the appeal proceedings against him and is continuing to represent him under the Criminal Justice Act. Respondent continues to qualify for appointment of counsel

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under the Criminal Justice Act.

It is, therefore, respectfully requested that respondent be allowed to proceed in forma pauperis.

DATED: January 15, 1985

Respectfully submitted,
LAW OFFICES OF TEDMON AND TEDMON

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Attorney for Respondent

NUMBER 84-836

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

DANIEL VASQUEZ, the Warden of San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent, BOOKER T. HILLERY, respectfully prays that the Petition for Writ of Certiorari requested to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 14, 1984, and the subsequent denial of the petition for rehearing and suggestion for rehearing en banc entered on September 12, 1984, be denied.

DATED: January 15, 1985

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BOOKER T. HILLERY, JR.,

Respondent.

RESPONSE TO THE PETITION FOR WRIT OF
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IN THE

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OCTOBER TERM 1984

DANIEL VASQUEZ, the Warden of
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v.

BOOKER T. HILLERY, JR.,

Respondent.

RESPONSE TO THE PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO THE QUESTIONS PRESENTED FOR REVIEW

1. The District Court properly applied settled law in finding reversible error once the State failed to rebut Respondent's prima facie case of discrimination in the grand jury selection process.

2. The simple mathematical calculation presented to the District Court did not change the evidentiary basis of the claim presented to the state courts.

PARTIES TO THE PROCEEDINGS

Besides the parties named in the captions, the State of California, as the Real Party in Interest, is the only other party to the proceeding.

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OPINION BELOW

Respondent accepts the "Opinion Below" statement as reported in petitioner's Petition and incorporates those opinions as though fully set forth herein.

STATEMENT OF JURISDICTION

Respondent asserts that this court has jurisdiction under 28 United States Code section 1254(1) and not under 28 United States 1257(e), as stated in petitioner's Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts petitioner's statement of constitutional and statutory provisions and incorporates them as though fully set forth herein.

STATEMENT OF THE CASE

Respondent makes the following additions to petitioner's statement of the case, which statement it incorporates herein, as though fully set forth.

On January 31, 1979, the District Court, per Judge MacBride, issued an order to show cause, finding that petitioner's, (respondent herein), allegations were sufficient to state a prima facie case of systematic exclusion (CR 2). See footnote 1 of Petitioner's petition at page 4 for an explanation of the reference nomenclature used herein.

The term "prima facie" has been used in two contexts in the instant case. In its first context, this term refers to the sufficiency of the allegations of the petition for a writ of habeas corpus and the court's decision as to whether to issue an order to show cause. Used in this context, the test is whether petitioner's allegations and the evidence offered in support thereof warrant issuing an order to show cause. An order to show cause will be issued where petitioner has made a prima facie showing in support of his claim for

relief.

Secondly, the term "prima facie case" has a more specialized meaning within the body of jury discrimination law. Here, "prima facie case" refers to the ability of the party claiming systematic exclusion to meet his burden of proof by showing that there has been such exclusion. If the state is unable to rebut the "prima facie case", the writ should be granted if the trial court, upon reviewing all the evidence, feels that petitioner has established systematic exclusion.

Respondent's return to the order to show cause was filed on March 22, 1979. (CR 4) In that return Respondent (petitioner herein) acknowledged that petitioner (respondent herein) had exhausted his state remedies as to the claims presented in the petition but denied that he was entitled to relief.

On April 23, 1979, petitioner (respondent herein) filed a traverse to the return to the order to show cause. In his traverse, he requested an evidentiary hearing. (CR 5)

On March 27, 1980, the District Court, per Judge Karlton, issued an order vacating that portion of the original order to show cause which held that the allegations of the petition were sufficient to establish a prima facie case of discrimination. The parties were directed to supplement and clarify the record under rule 7a of Title 28 United States Code section 2254. (CR 8).

STATEMENT OF FACTS

Respondent first raised the issue of the systematic exclusion of Blacks from the grand jury which indicted him in 1962, prior to his trial.

He raised the issue again both by way of direct appeal of his conviction and by habeas corpus in the state courts.

In all of the above proceedings he was denied relief.

He filed a petition for writ of habeas corpus in the

United States District Court making the same plea for relief. The first judge (The Honorable Thomas J. MacBride) to review his petition in Federal Court believed he had made out a prima facie case of discrimination and issued an order to show cause. The second judge (The Honorable Lawrence K. Karlton) to review his petition set aside the order to show cause, without denying the petition, and requested an expansion of the record to provide more information on which to base a decision. His reasons for requesting an expansion of the record were as follows:

1. To determine if there were Blacks eligible to be Grand Jurors at the times in question and,

2. If there were Blacks eligible for Grand Jury service, did they constitute a statistically significant percentage of the County's population.

Prior to this request, the California Supreme Court in People v Hillery, (1967) 62 Cal.2d. 795, cert. den. , 87 S.Ct. 958, found that the People did not dispute the allegation that no Negro had served on a Kings County grand jury since 1893, the year the county was formed. Finding further that the people introduced official census records showing that in 1960 Negroes constituted 5.1% of the total population of Kings County and that there had been Negroes on petit juries in that county.

From 1893 to the time of the indictment of respondent herein, in Kings County (1962), California, there was only one Superior Court Judge sitting at a time. The grand juries were always selected by the Superior Court Judge sitting at the time. Judge Wingrove took the Bench in 1956 and was the sitting Superior Court Judge at the time the indictment was handed down by the Grand Jury selected by the same Judge Wingrove.

At the hearing in the United States District Court, in response to the District Court Judge's request, Respondent herein (petitioner in the District Court), called witnesses who testified that there were cligible Blacks in the county at

times relevant to the case at bar and that to their knowledge none had ever served on a Kings County Grand Jury. They further testified that Blacks had qualified and served on petit juries at times relevant to the case at bar. In addition to the witnesses heretofore mentioned, respondent herein called an actuary to testify as to what the statistical probability would be that no Blacks would appear on a grand jury between the years 1900 and 1962. He based his analysis on official census data relating to Kings County during those years. He concluded that it would have been virtually impossible to have selected all non-black grand juries, on a random selection basis, during those years. He further testified that the probability that random selection would produce non-black grand juries for the years 1956 to 1962 (the years Judge Wingrove selected the grand juries) was approximately 2/10ths of 1 percent.

The State cross-examined the witnesses called by the respondent herein but did not call any witnesses to refute their testimony and the cross-examination did not change that testimony. The State called the actuary who had testified as petitioner's (respondent herein) expert as its own witness but was unable to elicit a change in his original testimony. The State produced no evidence nor any witnesses, either lay or expert, to refute the evidence produced in support of the claim of discrimination.

Based on the evidence presented by petitioner, (respondent herein), without any evidence or testimony produced by the State to refute or rebut that evidence, the District Court found that there was purposeful discrimination in the selection of the grand jury which indicted respondent herein and on that basis, in accordance with settled law, issued its order granting the petition for Writ of Habeas Corpus.

That District Court decision has been upheld by the United States Court of Appeals for the Ninth Circuit.

REASON FOR DENYING THE PETITION FOR THIS WRIT

This court has previously ruled that discrimination in the selection and makeup of grand juries is violative of constitutional rights requiring a reversal. There does not seem to be any ruling case law which is in conflict with that premise and therefore the law on that issue is settled law.

Petitioner has presented no evidence to this court that there is any conflict between the various circuits, on this issue, that would suggest a review of this case is necessary.

Respondent has no information to suggest that there are any other cases in this court at this time, on this particular issue, which would indicate a review of this case is necessary. Further, petitioner has presented no evidence of any other cases on this issue, currently before this court.

This case does not present issues which are new, unusual or of such novelty as to require an examination by this court.

Petitioner argues that the trial court committed error in applying a rule of per se reversible error in a case of discrimination in the selection of a grand jury when evidence of guilt at the trial is overwhelming. When petitioner takes this position he concedes that discrimination occurred and that the trial court's finding on that issue is correct. Therefore, the issue of whether discrimination occurred or not is not before this court. Petitioner then cites several holdings which he believes support his position that the discrimination is harmless error. However, an analysis of those case holdings clearly demonstrates that his position is not correct and that the District Court and the Appellate Court properly applied the existing settled law.

Petitioner cites Connecticut v Johnson (1983) ___U.S.___, 103 S. Ct. 969, for the doctrine of "harmless error", as it applies to criminal prosecutions. However, respondent contends that a full reading of Johnson compels

the conclusion that it cannot be used in analysis of the error in this case because the Johnson case involves jury instructions which invade the decision-making process of the jury. That process is a separate and distinct problem uniquely related to the trial phase and not the charging phase of a criminal prosecution. Incorporated in the discussion of the Johnson case, petitioner includes references to other cases as follows:

Chapman v California (1967), 386 U.S. 18, 87 S.Ct.824, 17 L. Ed. 2d. 705.

Gideon v Wainwright (1963) 372 U.S. 335.

Payne v Arkansas (1958) 356 U.S.560.

Tumey v Ohio (1927) 273 U.S. 510.

In each of the cases cited above, by petitioner, the court was dealing with a problem which occurred during the trial phase of the proceedings and was analyzing the impact of that error on the jury decision-making process. Therefore, respondent's position is that these cases cannot be used as "bootstrap" arguments for the premise that there can be harmless error when there has been a discriminatory selection of an indicting grand jury.

Petitioner attempts to minimize the impact of Rose v Mitchell (1979) 443 U.S. 545, where this court held that discrimination in the selection of a grand jury foreman in a state court proceeding is reversable error. Such an attempt must fail because the Rose court was examining the very problem presented in the case at bar, i.e. where the court itself becomes the discriminator. In Rose , supra, the members of the grand jury were selected by three jury commissioners from a list of qualified jurors on a random chance basis whereas, the foreman or forewoman was handpicked by the judge of the court having criminal jurisdiction. If the respondent in the Rose case had been able to make out a prima facie case of discrimination there can be no doubt that the conviction would have been overturned by that court. In the case at bar the Superior Court Judge selected all of the

grand jurors on a personal basis and based on the evidence presented at the hearing on the matter a prima facie case of discrimination, in the selection of the grand jury has been made out and stands unrebutted. The District Court properly applied Rose to the case at bar because the Superior Court itself, through Judge Wingrove, became the discriminator.

Petitioner cites Hobby v United States (1984) ___U.S.___, 104 S.Ct.3093, in an attempt to distinguish the instant case from Rose , supra, by minimizing the role of the California grand jury in relation to the Tennessee grand jury discussed in Rose . Chief Justice Burger, in delivering the opinion of the court in Hobby begins by stating that the reason for granting Certiorari was to resolve a conflict between the circuits as to:

> " ... whether discrimination in the selection of federal grand jury foremen, resulting in the under-representation of Negroes and women in that position, requires reversal of the conviction of a white male defendant and dismissal of the indictment against him." p. 3094

Here again, the court was not examining the entire makeup of the federal grand jury, but was merely looking at the foreman and his function in that federal grand jury when it stated:

> "....the federal foreman, unlike the foreman in Rose , cannot be viewed as the surrogate of the judge. So long as the grand jury itself is properly constituted , there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process." p. 3098 (emphasis added)

Chief Justice Burger further emphasized the distinction between the selection of the grand jury foreman and the selection of the grand jury itself when he stated at page 3096:

> "Discrimination in the selection of the grand jury foreman- as distinguished from discrimination in the selection of the grand jury itself - does not in any sense threaten the interests of the defendant protected by the Due Process Clause. Unlike the grand jury itself , the office of the grand jury foreman is not a creature of the constitution; instead, the post of fore-

> man was originally instituted by statute for the convenience of the court." (emphasis added)

It appears to respondent that the message of the Court, in all of the cases, is crystal clear; that message being that, where a court itself becomes the discriminator or discriminating influence in the selection of the grand jury, an indictment handed down by that grand jury cannot stand and any conviction obtained, which follows that judicial taint, is "per-se" reversible error.

Petitioner's second issue contends that "Respondent failed to exhaust his available state remedies since he significantly changed the evidentiary basis of his claim for relief without ever presenting this new evidence to state courts."

In order to determine if respondent truly failed to exhaust his state court remedies, it is necessary to examine the state court record of proceedings.

The California Supreme Court, in reviewing respondent's conviction, found that it was undisputed that no black had ever served upon a grand jury in Kings County from its inception until the time of the opinion. The Court stated:

> "here the record shows that affidavits in support of and in opposition to defendants motion were filed, and a hearing was held at which evidence was taken. Defendant sought to prove that no Negro had served on a Kings County Grand Jury since 1893, the year in which the Couny was organized. The people did not dispute this fact, but introduced evidence based on official census records that established that in 1960 Negros constituted only 5.1% of the total population of Kings County, and that prior to World War II the proportion had been 1% or less." People v Hillery , 62 Cal. 2d. 692, 709 (1965), cert denied 386 U.S. 938 (1967).

Petitioner argues that the probability analysis used dramatically changed the evidentiary basis of respondent's claim after it was filed in the Federal Court. Petitioner fails to realize that although the State Court factual determinations are presumed to be correct, it is the Federal

District Court's duty to independently apply the applicable Federal law to the State Court factual findings. Townsend v Sain , 372 U.S. at 318; Brown v Allen , 344 U.S. 443, 507 (1953); Mata v Sumner , 649 Fed. 2d. 713, 716 (9th Cir. 1981). Respondent's Federal claim is based on his allegation that Blacks were systematically excluded from the grand jury which indicted him. In applying the applicable Federal law and the Equal Protection Clause of the 14th Amendment to such claims, the Supreme Court has observed that:

> "the court has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account possible explanatory factors." Alexander v Louisiana , 495 U.S. 625, 630 (1972); Castaneda v Partida , 430 U.S. 482, 496 n.17 (1977); Guice v Fortenberry , 661 F.2d. 496, 505 (5th Cir. 1981).

Petitioner states at page 40 of his Petition that "It is sufficient if the new factual allegations are simply "more compelling." (emphasis added).

Respondent submits that there were no new factual allegations presented to the Federal Court. Petitioner states at page 39 of his petition that, "....respondent now relies upon what he claims is a sophisticated computer analysis of the statistical probability that blacks would not have served ..."

At no time has respondent ever stated that he relied on a "sophisticated computer analysis" of any data. The position of respondent has remained the same throughout all of the proceedings; that blacks were systematically excluded from grand jury service in Kings County, California. An examination of the method of analysis of the census data reveals that it was merely a simple arithmetic calculation to arrive at probabililty data. The fact that a computer was used was merely a means to expedite the calculation.

CONCLUSION

Petitioner has failed to show any dispute between the

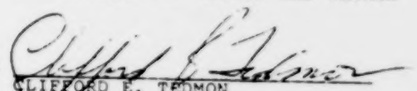
Circuits on the issues raised herein which requires an analysis by this Court. Further, the issues themselves present no new, unique or unusual questions requiring resolution by this Court. All of the issues raised by Petitioner have been resolved at both the District Court and Circuit Court levels in accord with settled law.

Based on the foregoing, it is therefore prayed that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

DATED: January 15, 1985

Respectfully submitted,

LAW OFFICES OF TEDMON AND TEDMON

By: 

CLIFFORD E. TEDMON
2277 Watt Avenue, Suite 304
Sacramento, California 95825
Telephone: (916) 481-5042

Attorney for Respondent

CERTIFICATE OF SERVICE

DANIEL VASQUEZ, the Warden
of San Quentin State Prison

Petitioner,

v.

No. 84-836
October Term, 1984

BOOKER T. HILLERY,

Respondent.

_____/

The undersigned hereby certifies that she is an employee of the LAW OFFICES OF TEDMON & TEDMON and is a person of such age and discretion as to be competent to serve papers.

On January 15, 1985, she personally served a copy of the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT upon Petitioner by placing it in the UNITED STATES MAILS addressed as follows:

UNITED STATES MAILS

JOHN K. VAN DE KAMP
Attorney General of the State of California

WILLIAM GEORGE PRAHL
Deputy Attorney General
1515 K Street, Suite 511
Sacramento, California 95814

BOOKER T. HILLERY, JR.
P.O. Box A-32262
Tamal, California 94964

Lisa Richardson

LISA RICHARDSON

Office-Supreme Court, U.S.
FILED
MAY 20 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-836

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

JOHN K. VAN DE KAMP
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Attorney for
Respondent

PETITION FOR CERTIORARI FILED NOVEMBER 21,
1984, CERTIORARI GRANTED MARCH 4, 1985

JOINT APPENDIX

Item	Pages
Chronological List of Relevant Docket Entries	JA-1 - JA-12
Excerpt from the Motion to Dismiss the Petition for a Writ of Habeas Corpus filed in the District Court on October 30, 1981	JA-13 - JA-16
Excerpt from State Court Clerk's Transcript Relating to the Motion to Quash Filed by Respondent Booker T. Hillery in His Original Murder Trial . .	JA-17 - JA-45
Excerpt from the Opinion of the California Supreme Court Affirming the Trial Court's Denial of the Motion to Quash the Indictment	JA-46 - JA-51

Joint Appendix cont'd.

Item	Pages
Excerpt from the Motion Filed by the State of California in the United States District Court Relating to the Expanded Record Before the District Court in the Habeas Corpus Proceeding	JA-52 - JA-54
The Computer Report Prepared by Consulting Actuary Donald Parkyn Which was Filed in the United States District Court for the Eastern District of California . .	JA-55 - JA-67
The Order to Show Cause issued by the District Court on January 31, 1979	JA-68 - JA-76

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KINGS

People v. Booker T. Hillery
Crim. No. 3922

Docket No.	Docket Entry
CT 1 [1]	The Grand Jury of Kings County returned an indictment on June 27, 1962, charging respondent Booker T. Hillery with a violation of California Penal Code section 187 in that on or about the 21st of March, 1962, respondent did willfully,

1. Hereafter "CT" refers to the Clerk's Transcript prepared in connection with the appeal of respondent's first state court trial; "RT" refers to the Reporter's Transcript prepared in connection with the appeal of respondent's first state court trial; "CR" refers to the Clerk's Record for the Ninth Circuit appeal in this case.

Docket No.	Docket Entry
	unlawfully, and feloniously murder Marlene Miller.
CT 11-29	On July 16, 1962, respondent, through his attorney, made a motion to quash the indictment. The motion alleged that members of respondent's race had been systematically and purposely excluded from the Grand Jury which indicted him.
CT 41	Respondent's motion was heard, considered, and denied on July 31, 1962.
CT 75	On November 16, 1962, the jury returned a verdict of guilty as to the charged offense and fixed the degree at first degree murder.
CT 132	On November 20, 1962, the jury returned a verdict fixing respondent's penalty at death.

Docket No.	Docket Entry
CT 145	On November 26, 1962, the court imposed a judgment of death.
CT 145	An automatic appeal to the California Supreme Court followed pursuant to section 1239(b) of the Penal Code.

SUPREME COURT OF THE STATE OF CALIFORNIA

People v. Booker T. Hillery
Crim. No. 7320

CR 1	On May 3, 1965, the California Supreme Court filed an opinion affirming the guilt phase of respondent's trial but reversed imposition of the death penalty. (People v. Hillery (1965) 62 Cal.2d 692.)
CR 1	Respondent was to be subsequently given two additional

Docket No.	Docket Entry
	penalty trials with each resulting in imposition of a death sentence. (See People v. Hillery (1967) 62 Cal.2d 795, cert. en., 87 S.Ct. 958 (1967); In re Hillery (1969) 71 Cal.2d 857.) Finally, respondent's third death sentence was reduced to life imprisonment as a result of the California Supreme Court's decision in People v. Anderson (1972) 6 Cal.3d 628. (See People v. Hillery (1974) 10 Cal.3d 897.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

HC No. 87642

CR 1	11/30/78	Petition for writ of habeas corpus denied.

Docket No. Docket Entry

COURT OF APPEAL OF THE STATE

OF CALIFORNIA, FIRST APPELLATE DISTRICT

In re Booker T. Hillery
1 Crim. 17891

CR 1 3/8/78 Petition for writ of habeas corpus denied.

SUPREME COURT OF THE STATE OF CALIFORNIA

In re Booker T. Hillery
Crim. No. 20424

CR 1 4/18/78 Petition for writ of habeas corpus denied.

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

Booker T. Hillery v. George Sumner, Warden
Civil No. S-78-594 TJM

CR 1 5/22/78 Respondent filed a habeas corpus petition in

Docket No.		Docket Entry
		the United States District Court for the Northern District of California on May 22, 1978. It was later transferred to the Eastern District.
CR 2	1/31/79	On January 31, 1979, the District Court, per Judge MacBride, issued an order to show cause. The court's order granted respondent permission to proceed in forma pauperis.
CR 4	3/22/79	Petitioner's Return to the order to show cause was filed on March 22, 1979 and
CR 5	4/23/79	on April 23, 1979, respondent filed his traverse.
CR 16	6/19/80	In response to a motion
CR 20	7/11/80	filed by petitioner on

Docket No.		Docket Entry
		June 19, 1980 and an opposition filed by respondent on July 11, 1980, the District
CR 21	8/7/80	Court on August 7, 1980 issued a published order denying petitioner's various dispositive motions. (Hillery v. Sumner (E.D. Cal. 1980) 496 F.Supp. 632.)
CR 31	9/29/81	In an order dated September 29, 1981, which followed a status conference, the District Court directed respondent to prepare a proposed stipulation which was to have attached to it all of the documents which supported respondent's claim of systematic exclusion. The

Docket No.		Docket Entry
		stipulation was to include those matters which petitioner agreed could be submitted to the District Court on documents alone (CR 31).
CR 32	10/14/81	The stipulation was filed on or about October 14, 1981.
CR 34	10/30/81	On October 30, 1981, petitioner filed a document entitled response to the District Court's order of September 29, 1981, along with a notice of motion and motion to dismiss the petition.
CR 36	11/10/81	On November 10, 1981, petitioner filed a notice of motions and motions for dismissal of petition for

Docket No.		Docket Entry
		failure to exhaust as to the newly discovered and recently produced evidence and for summary denial of the petition.
CR 39	3/9/82	On March 9, 1982, the District Court filed a published opinion denying the state's motion. The court held, inter alia, that respondent's allegations were sufficient to support a prima facie case and to preclude the summary dismissal of the petition. (Hillery v. Pulley (E.D. Cal. 1982) 533 F.Supp. 1189.)
CR 56	5/12/83	On May 12, 1983, the District Court issued its published 54-page opinion

Docket No.	Docket Entry
	granting the petition for a writ of habeas corpus. (Hillery v. Pulley (E.D. Cal. 1983) 563 F.Supp. 1228.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Booker T. Hillery v. R. Pulley, Warden
No. CA 83-2017

5/14/84	The published majority and dissenting opinions of the Ninth Circuit Court of Appeal affirming an order of the United States District Court for the Eastern District of California were filed on Mar 14, 1984.
9/12/84	A timely petition for rehearing and a suggestion

Docket No.	Docket Entry
	for rehearing en banc was thereafter filed in the Ninth Circuit Court of Appeal. That court filed an order denying rehearing on September 12, 1984.

SUPREME COURT OF THE UNITED STATES

D. Vasquez, Warden v. Booker T. Hillery
No. 84-836

11/21/84	Petition for writ of certiorari to United States Court of Appeals for the Ninth Circuit filed in Supreme Court of United States by D. Vasquez, Warden (No. 84-836).
3/4/85	Petition for D. Vasquez, Warden, granted by Supreme

Docket No.	Docket Entry
	Court of United States
	(No. 84-836).

EXCERPT FROM THE MOTION TO DISMISS THE PETITION FOR A WRIT OF HABEAS CORPUS FILED IN THE DISTRICT COURT ON OCTOBER 30, 1981

(Docket Entry CR 36)

THE STATE COURT RECORD

1. Trial Court Record

A. Clerk's Transcript

(1) pp. 11-13 Motion to quash dated July 16, 1962.

(2) pp. 26-27 Motion to quash the indictment.

(3) pp. 28-29 Declaration of Booker T. Hillery in support of motion to quash the indictment dated July 23, 1962.

(4) pp. 30-31 Declaration of Charles Leach in opposition to motion to quash.

(5) pp. 32-38 Declaration of Vernice Thomsen in opposition to motion to quash.

(6) pp. 39-40 Declaration of Alice Hanna [1/] in opposition to motion to quash.

B. (1) Reporter's Transcript, session of July 16, 1962, pp. 6-14.

(2) Reporter's Transcript, session of July 31, 1962, pp. 15-126.

---

1. In her declaration, Alice Hanna used the United States Census reports to compile the following table population figures:

Year	Total Population	Black Population	Black % of Total Population
1910	16,200	172	1.0
1920	22,028	180	0.8
1930	21,894	247	1.1
1940	35,159	324	0.9
1950	45,800	1,819	3.97
1960	49,944	2,578	5.1

2. Appellate Court Record

(1) Appellant's opening brief

(2) Respondent's brief

(3) Appellant's closing brief

(4) The decision of the California Supreme Court which is reported as People v. Hillery (1965) 62 Cal.2d 692.

EXCERPT FROM STATE COURT CLERK'S TRANSCRIPT RELATING TO THE MOTION TO QUASH FILED BY RESPONDENT BOOKER T. HILLERY IN HIS ORIGINAL MURDER TRIAL

(Docket Entry CT 11-29)

(Title of Court and Cause)

MOTION TO QUASH INDICTMENT; MOTION TO SET ASIDE INDICTMENT (P.C. 995); MOTION TO PRODUCE PHOTOCOPIES, MAPS AND ALL PHYSICAL EVIDENCE; MOTION FOR EXAMINATION OF WITNESSES

The defendant, Booker T. Hillery, Jr., hereby moves the court as follows:

I. To quash the indictment herein on the following grounds:

1. That indictment by grand jury violates the following amendments to the United States Constitution:

(a) Due Process clause of the 14th Amendment;

(b) Equal Protection clause of the 14th Amendment.

2. That the grand jury proceedings, as apply to

this particular case, violate the Due Process and Equal Protection Clauses of the 14th Amendment of the United States Constitution.

3. That Negroes have been, and are, systematically excluded from service on grand juries in Kings County, California, and that the grand jury which brought in the indictment was a grand jury on which Negroes were systematically excluded, and this in violation

of the Due Process and Equal Protection clauses of the 14th Amendment of the Constitution of the United States.

4. Bias, prejudice and partiality on the part of some members of the grand jury which indicated the defendant in violation of the Penal Code governing grand jury proceedings.
5. Presence of unauthorized persons during grand jury sessions in violation of Penal Code sections governing grand jury proceedings.
6. Prejudicial misconduct on the part of District Attorney Charles F. Leach,

and Assistant Attorney Ralston Courtney during the grand jury proceedings that led to the indictment herein.

7. The advising of a witness by investigating officers against giving testimony in favor of the defendant at the grand jury proceedings that led to the indictment herein.

II. Motion to set aside the indictment (P.C. Sec. 995, subdivision 1) upon the ground that the defendant has been indicted without reasonable or probable cause.

III. Motion for Production of Evidence

The defendant hereby moves for an order of this court to

permit the defendant, and his counsel, together with such other persons as the defendant may deem proper, to examine all exhibits introduced at the grand jury proceedings which led to the indictment herein, and for copies of all statements and documents and exhibits of all kinds in the possession of any law enforcement agency, or in possession of the district attorney, or in the possession of any officer connection with the investigation on behalf of the People of the State of California.

IV. That the defendant be permitted to examine certain witnesses under oath, in order that their testimony may be available at the time of trial, if any, because of the possibility that said witnesses will not be available, because of death, because of the transitory nature of their employment, and such other reasons as are set forth in the affidavits to be filed herewith.

Said motions will be made on the records, proceedings, and files in this action, and upon affidavits or declarations under penalty of perjury, and upon testimony

that may be elicited at the time the motions are heard, and such other matters as counsel deems pertinent thereto.

Date: July 16, 1962 Respectfully submitted,

/s/Hugh Wesley Goodwin

Receipt is hereby acknowledged of the hereinafter Motion, and Declaration in Support of said motion, and Points & Authorities.

/s/ ANITA L. CHANDLER
District Attorney,
Kings County

(Title of Court and Cause)

MOTION TO QUASH AND SET ASIDE INDICTMENT

To the People of the State of California, plaintiff, and the Charles F. Leach, District Attorney, Kings County:

You will please take notice that on Tuesday, the 31st day of July, 1962, at 10 o'clock A.M. of said day, at the courtroom of the above-entitled court at the courthouse in the city of Hanford, County of Kings, State of California, the above-named defendant will move the court for an order

quashing and setting aside the indictment filed herein. Said motion will be made upon the grounds that the indictment herein resulted from procedures which violated the defendant's rights as guaranteed by the 14th Amendment of the Constitution of the United States, and upon the further ground that the defendant had been indicted without reasonable and probable cause in violation of Section 995 of the California Penal Code.

Said motion will be based upon this notice; upon the declaration under penalty of perjury of Booker T. Hillery, Jr., attached hereto, and upon testimony to be adduced at the time of hearing, and upon the proceedings, records, and files herein.

/s/ HUGH WESLEY GOODWIN
Attorney for defendant

(Title of Court and Cause)

DECLARATION IN SUPPORT OF MOTION TO QUASH AND SET ASIDE INDICTMENT

BOOKER T. HILLERY, JR., hereby declares: That he is the defendant in the above-entitled action; that he has filed a motion to quash the indictment herein because his rights under the 14th Amendment of the Federal Constitution have been violated in that, among other things, the grand jury that indicted him, and the previous grand juries from which members of his race have been systematically excluded. The declarant is a member of the Negro race; that his information is that the County of Kings has been organized as a political subdivision of the State of California since at least 1893. That since the said 1893 no Negroes have ever

served on a grand jury panel in the said County of Kings. Not only is it true that no Negro has served on any grand jury in the County of Kings but it is further declarant's information that no Negro's name has been submitted among those from whom the various grand jury panels have been selected. That the reason for this exclusion has been because of the race or color of the Negro people. That this information was not available to declarant until after this indictment was filed against him. That it is declarant's information that the Negro population in Kings County is now between

8 to 15 percent of the total population, and this percentage has been true, declarant believes, all during said period except he is very certain that it has been true during and since World War II that among the Negroes that constitute the 8 to 15 percent of the residents of Kings County, there are many Negroes because of educational and other qualifications who would be and would have been eligible to serve on the grand jury had their names been submitted and has not members of their race been systematically excluded from the said grand jury panels.

I declare under penalty of perjury that the foregoing statement is true and correct.

Executed at Hanford, California,

July 23, 1962.

/s/BOOKER T. HILLERY, JR.

POINTS & AUTHORITIES:

14th Amendment, U. S. Constitution
Reece vs. State of Georgia, 350 U.S. 76
Patton vs. State of Mississippi, 332 U.S. 463
Norris vs. State of Alabama, 274 U.S. 367
Carter vs. State of Texas, 177 U.S. 442
Smith vs. State of Texas, 311 U.S. 128
Hernandez vs. State of Texas, 347 U.S. 475
Penal Code, Sec. 995

(ENDORSED)

FILED JULY 23, 1962
VERNICE THOMSEN, CLERK
BY _____ DEPUTY

(Title of Court and Cause)

DECLARATION OF CHARLES F. LEACH
IN OPPOSITION TO THE MOTION TO
SET ASIDE INDICTMENT

Charles F. Leach hereby makes the following declaration:

(1) That I am the District Attorney of the County of Kings, State of California, and have held that office since January, 1957; that I was a deputy in such office from November 17, 1952 to October, 1954.

(2) That the records in the County Clerk's office show that there were in excess of 1,000 criminal prosecutions initiated by information in the Superior Court of the State of California, in and for the County of Kings between the period of January 1, 1952 to January 1, 1962.

(3) That during the same period, viz: January 1, 1952 to January 1, 1962, there were only four felony prosecutions initiated by grand jury indictment. That only one of this number was a member of the Negro race, namely Sherman Dillard; that during the current year there has been one indictment, namely, Booker T. Hillery, Jr.

(4) That it is customary for the grand jury in Kings County to devote practically all of its time to the investigation of County departments, institutions and officers, hospital districts, school districts and special districts, and that rarely is any of the grand jury's time devoted to hearing evidence of criminal offenses.

(5) That I have observed from the vantage point of my office the selection of trial and grand juries for the past ten years; that no class of persons has been systematically excluded from such juries because of race, creed or wealth.

I make this declaration under penalty of perjury at Hanford, in the County of Kings, State of California, this 31st day of July, 1962.

/s/ CHARLES F. LEACH
CHARLES F. LEACH
District Attorney

(ENDORSED)

FILED JULY 31, 1962
VERNICE THOMSEN, CLERK
BY _____ DEPUTY

(Title of Court and Cause)

DECLARATION OF VERNICE
THOMSEN IN OPPOSITION TO
MOTION TO SET ASIDE INDICTMENT

Vernice Thomsen makes the following declaration:

(1) I am the County Clerk of the County of Kings, State of California. I have held such office since 1953. Prior to that time I was a deputy to the County Clerk of the County of Kings, which occupation I commenced in the year 1939.

As a part of my function as County Clerk I am also ex-officio Clerk of the Superior Court and ex-officio Clerk of the Board of Supervisors.

(2) I participate in the selection of Trial Jurors in the following manner:

(a) In January of each year, the Judge of the Superior Court delivers to

me an order designating the number of grand and trial jurors that he estimates will be needed during the ensuing year.

(b) Upon receipt of this order I make reference to the current County Register of Voters and determine the identities of all registered voters thereon who are disqualified by virtue of prior trial or grand jury service.

(c) I then prepare a list of registered voters in each Supervisorial District who are not disqualified by virtue of prior trial or grand jury service. These lists are given the respective Supervisors. I also inform each Supervisor of the total number of jurors that the Court has estimated will be required for jury service during the next succeeding twelve months. I also inform

each of them of the specified statutory qualifications for jurors and of the statutory exemptions.

(d) Thereafter, and within approximately sixty days, each of the Supervisors provides me with a list of registered voters within his Supervisorial District whom he has selected as prospective trial jurors. Usually, the lists combined exceed the number of trial jurors ordered selected by the Superior Court Judge.

(e) I then check the names submitted by the Supervisors against the Voter's Registration Affidavit to determine current address and occupation. I check the occupation only to the extent necessary to determine whether the person is exempt from

jury service. All persons exempt by statute are elminated from the lists.

(f) My next procedure is to select alternately from each Supervisor's list an amount equivalent to one-fifth of the total number of jurors ordered to be selected by the Superior Court Judge. This compilation is by chance. When this list is completed it is submitted to the Board of Supervisors for their approval.

(g) Each of the prospective jurors named on the list as finally approved by the Board of Supervisors is mailed a questionnaire and covering letter, a copy of which

is attached hereto, marked Exhibit "A," and incorporated herein by reference. At no time is there any designation on any of the aforesaid lists by which the prospective juror's race, color or creed can be determined. I have never made any distinction between men or women in the preparation of lists of prospective jurors or has any distinction been made upon the basis of wealth, poverty, race, or creed.

(h) I know it to be a fact that since I have taken office as County Clerk of Kings County, members of the Negro race have been selected to act as trial jurors.

(3) I participate in the selection of grand jurors in the following manner:

(a) As a part of the same order pursuant to which trial jurors are selected, there is contained an order specifying the number of grand jurors to be summoned from which a panel of grand jurors is to be drawn for the ensuing year.

(b) In regard to the selection of grand jurors, the Superior Court Judge provides me with a list of approximately thirty-five to forty names along with a request that I determine from the Register of Voters the correct address of each person so listed, and also whether any person whose name appears upon said list is exempt because of occupation. I also determine from the trial jury records and grand jury records whether any of the persons whose names appear

on the Judge's list are disqualified because of prior jury service.

(c) The prospective grand jury list is then returned to the Judge of the Superior Court who, in due course, provides me with a final list.

(d) I have never been requested by any Superior Court Judge during my term as County Clerk to provide him with information relative to the race, creed, wealth, or poverty of any prospective grand juror.

I make this declaration under penalty of perjury at Hanford, in the County of Kings, State of California, this 31st day of July, 1962.

/s/ VERNICE THOMSEN
VERNICE THOMSEN

DECLARATION OF ALICE
HANNA IN OPPOSITION TO
MOTION TO SET ASIDE INDICTMENT

Alice Hanna hereby makes the following declaration:

(1) I am the County Librarian for the County of Kings, State of California. I have had that occupation and position for seven years last past.

(2) That at the request of Charles F. Leach, District Attorney of the County of Kings, and from information within my custody and control and available to me in my capacity as County Librarian, I compiled the following statistics:

(a) In the year 1910 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 16,200; 172 of said inhabitants were reported as being members of the Negro race; statistically, the reported Negro population was 1.0% of the total population.

(b) In the year 1920 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 22,028; 180 of said inhabitants were reported as being members of the Negro race; statistically, the reported Negro population was 0.8% of the total population.

(c) In the year 1930 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 21,894; 247 of said inhabitants were reported as being members of the Negro race; statistically, the reported Negro population was 1.1% of the total population.

(d) In the year 1940 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 35,159; 324 of said inhabitants were reported as being members of the Negro race; statistically, the

reported Negro population was 0.9% of the total population.

(e) In the year 1950 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 45,800; 1819 of said inhabitants were reported as being members of the Negro race; statistically, the reported Negro population was 3.9% of the total population.

(f) In the year 1960 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 49,944; 2,578 of said inhabitants were reported as being members of the Negro race; statistically, the reported Negro population was 5.1% of the total population.

I make this declaration under penalty of perjury at Hanford, in the County of Kings, State of California, this 30th day of July, 1962.

/s/ ALICE HANNA
ALICE HANNA

Year	Total Population	Black Population	Black % of Total Population
1910	16,200	172	1.0
1920	22,028	180	0.8
1930	21,894	247	1.1
1940	35,159	324	0.9
1950	45,800	1,819	3.97
1960	49,944	2,578	5.1

EXCERPT FROM THE OPINION OF THE CALIFORNIA SUPREME COURT AFFIRMING THE TRIAL COURT'S DENIAL OF THE MOTION TO QUASH THE INDICTMENT

(People v. Hillery
(1965) 62 Cal.2d 692)

Defendant points out that he is a Negro and contends that the court erred in denying his motion to quash the indictment on the ground that members of his race were systematically and purposefully excluded from the grand jury which indicted him. But a factual basis for this objection was not established. Defendant relies on such decisions as Patton v. Mississippi (1947) 332 U.S. 463 (see also cases cited at p. 465, fn. 3, of 332 U.S.). As the latter opinion makes clear, however, "whether there has been systematic racial discrimination by administrative officals in the selection of jurors is a question to be determined from the facts in each particular case." (Id., at p. 466.)

Here the record shows that affidavits in support of and in opposition to defendant's motions were filed, and a hearing was held at which evidence was taken.

Defendant sought to prove that no Negro had served on a Kings County grand jury since 1893, the year in which the county was organized. The People did not dispute this fact, but introduced evidence based on official census records establishing that in 1960 Negroes constituted only 5.1 percent of the total population of Kings County, and that prior to World War II the proportion had been one percent or less. It was also shown that Negroes had often served on petit juries in Kings County (and defendant does not complain of the fact that there was no Negro on the jury that tried and convicted him). The county clerk certified that it was her duty to check the proposed grand jury list against the voters' registration affidavits to determine whether any persons therein named were disqualified by statute, but that such affidavits bear no indication as to the race of the voter; she further testified that

during her tenure in office (since 1953) no member of the board of supervisors or judge of the superior court had ever requested her to determine the race of a prospective grand juror.

In the course of the hearing on the motion to quash the trial judge spoke at length on the subject of his method of selecting grand juries since he took office in 1956, and subsequently ordered that such statements be considered as his testimony. He said that in selecting a panel he "always endeavors on each one of those [judicial] districts to get a good cross section of people who will be qualified to serve as Grand Jurors"; that he had consistently "tried to get a distribution of racial descents, tried to get both sexes represented, tried to get occupations, farmer, business men and various other types so it will be real -- a real representative

group of people, of the better type"; and that since 1956 he had not had a Negro on the panel "not through lack of desire, but purely through lack of ability to find one that the Court feels would make a proper Grand Juror." The judge pointed out that he had practically asked defendant's counsel to suggest the names of Negro residents who might be qualified to serve, and had considered selecting a Mr. Lloyd Welcher but declined to do so after determining that the duties would interfere with the latter's regular employment. Finally, it was shown that in Kings County "rarely is any of the grand jury's time devoted to hearing evidence of criminal offense," and that in the decade ending in 1962 more than 1,000 prosecutions were initiated by information while four were initiated by indictment and only one of the latter was against a Negro.

The foregoing record amply supports the trial court's determination that there was no systematic exclusion of Negroes from the grand jury which indicted defendant. In this respect the case at bench is indistinguishable from and is controlled by our decision in People v. Burwell (1955) 44 Cal.2d 16, 41-42 [36], cert. denied, 349 U.S. 936.

defendant's remaining contentions -- that in several respects the grand jury proceedings were not conducted in accordance with law -- have been examined and are so devoid of merit as to require no particular discussion.

By supplemental brief prepared in propria persona defendant contends that evidence was introduced against him which had been illegally seized from his automobile and his hotel room. No objection was interposed on this ground.

EXCERPT FROM THE MOTION FILED BY THE STATE OF CALIFORNIA IN THE UNITED STATES DISTRICT COURT RELATING TO THE EXPANDED RECORD BEFORE THE DISTRICT COURT IN THE HABEAS CORPUS PROCEEDINGS

(Docket Entry CR 36)

PETITIONER'S VERSION OF THE EXPANDED RECORD

Petitioner was directed to attach all of the evidence he has in support of his claim regarding the systematice exclusion of blacks from the Kings County grand jury to the stipulation he filed in October of 1981. The foregoing is a list of the material which is not a part of the state court record which is attached to the stipulation:

1. Declaration of Oliver F. Folsom dated June 16, 1980.

2. Declaration of Evvie Edwards dated June 11, 1980.

3. Declaration of Joshua Richardson dated June 9, 1980.

4. U.S. Census Bureau records for the years: 2/

---

2. Petitioner has not limited his use of the census data to that of Alice Hanna. Petitioner has expanded the use of census data and is now using census data to establish the population of persons eligible to serve on the grand jury. In addition, petitioner had introduced census figures for 1900 which were not introduced or used in his motion to quash.

(a) 1900

(b) 1910

(c) 1920

(d) 1930

(e) 1940

(f) 1950

(g) 1960

5. Bene-tech report prepared by Donald Parkyn.

THE COMPUTER REPORT PREPARED BY CONSULTING ACTUARY DONALD PARKYN WHICH WAS FILED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

(Docket Entry CR 36)

DONALD W. PARKYN, INC.
Consulting Actuaries
Post Office Box 1196
Sacramento, California 95806

916-481-7825

August 31, 1981

Clifford Tedmon
Tedmon & Tedmon
2717 Cottage Way, #20
Sacramento, California 95825

Dear Mr. Tedmon:

You asked me to calculate the probability that a jury of nineteen non-blacks could be selected each year from 1900 through 1962 in Kings County California.

Table 1 provides a summary of the data from U.S. census reports. The data for 1920 and prior are based upon males only as females were not eligible to vote and therefore, according to my best information, were not eligible for jury duty. The data is for persons age 21 and over.

Table 1

Basic Information From U.S. Census Reports

Year	Total Population Males	Females	Total	Non-White Population Males [A]	[B]	Females [A]	[B]	Eligible Total	Black
1900	3,446			27				3,446	27
1910	5,765			53+558= 611				5,765	53
1920	7,547	5,519	13,066	59+629= 688		49+176= 225		13,066	108
1930	8,098	6,430	14,528	93+484= 577		76+184= 260		14,528	169
1940	11,328	9,773	21,101	130+319= 449		100+164= 264		21,101	230
1950	13,807	13,084	26,891		801		638	26,891	
1960	13,949	13,728	27,677		907		749	27,677	
1970	18,458	17,620	36,078	799+611=1410		740+689=1429		36,078	1539

[A] = Black
[B] = Other non-White

For the 1950 and 1960 census a breakdown of black males and black females age 21 and over was not available. These values were estimated from a known breakdown of black males and black females at all ages as shown in Table 2.

Table 2

Estimated Split of Non-Whites
between Black and Other Non-Whites

Year 1950:

	Male	Female	Total
Black	958	861	
Other	346	278	
Total	1,304	1,139	
Over 21 Black	801 [588]	638 [482]	[1,070]

Year 1960:

	Male	Female	Total
Black	1,385	1,193	
Other	359	318	
Total	1,744	1,511	
Over 21 Black	907 [702]	749 [591]	[1,311]

[__] indicates data was estimated.

Table 3 combines information from Tables 1 and 2 and provides the basic information used in my analysis.

Table 3

Information Combines from Table 1 and Table 2

Year	Total Population Males	Females	Total	Non-White Population Males [A]	[B]	Females [A]	[B]	Eligible Total	Black
1900	3,446			27				3,446	27
1910	5,765			53+558= 611				5,765	53
1920	7,547	5,519	13,066	59+629= 688		49+176= 225		13,066	108
1930	8,098	6,430	14,528	93+484= 577		76+184= 260		14,528	169
1940	11,328	9,773	21,101	130+319= 449		100+164= 264		21,101	230
1950	13,807	13,084	26,891	[588]	801	[482]	638	26,891	1070
1960	13,949	13,728	27,677	[720]	907	[591]	749	27,677	1311
1970	18,458	17,620	36,078	799+611=1410		740+689=1429		36,078	1539

[A] = Black
[B] = Other non-White

Table 4 shows the percentage of blacks in Kings county for each census. This table is derived from Table 3.

Table 4

Percentage Black

Year	Blacks/Total	%-Black
1900	27/ 3,446	.7835
1910	53/ 5,765	.9193
1920	108/13,066	.8266
1930	169/14,528	1.1633
1940	230/21,101	1.0900
1950	1,070/26,891	3.9790
1960	1,311/27,677	4.7368
1970	1,539/36,078	4.2658

Table 5 is an estimate of the percentage of blacks age 21 and over in Kings County for each year 1900 thru 1962. The values in Table 5 are the result of a graduation of the decennial values shown in Table 4. The percentages are deliberately understated at most ages. This understatement has the effect of increasing the probability that an all non-black jury can be formed.

Table 5

Percentage Black
Estimated by Year

Year	%-Black	Year	%-Black
1900-1940	.8000	1952	4.0000
1941	1.1100	1953	4.1000
1942	1.4200	1954	4.2000
1943	1.7300	1955	4.3000
1944	2.0400	1956	4.3900
1945	2.3500	1957	4.4800
1946	2.6600	1958	4.5700
1947	2.9700	1959	4.6500
1948	3.1800	1960	4.7300
1949	3.4900	1961	4.7300
1950	3.8000	1962	4.7300
1951	3.9000		

Table 6 presents the results of my analysis. Column 1 represents the year. Column 2 is the assumed percentage of blacks for that year. Column 3 is the probability [expressed as a percentage] that a jury of 19 non-blacks could be selected at random for that year. Column 4 represents the probability [expressed as a percentage] that all juries formed from 1900 thru the year shown would be comprised entirely of non-blacks if selection had been made on a purely random basis.

Table 6

Probability Year's Grand Jury is Non-Black and Probability This and All Prior Juries Were Non-Black Based Upon the Assumption Jury Selection Was Random

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1900	.80	85.846338	85.846338192
1901	.80	85.846338	73.695937809
1902	.80	85.846338	63.265264006
1903	.80	85.846338	54.310912496
1904	.80	85.846338	46.623929616
1905	.80	85.846338	40.024936297
1906	.80	85.846338	34.359942174
1907	.80	85.846338	29.496752162
1908	.80	85.846338	25.321881616
1909	.80	85.846338	21.737908129
1910	.80	85.846338	18.661198128
1911	.80	85.846338	16.019955256
1912	.80	85.846338	13.752544967
1913	.80	85.846338	11.806056262
1914	.80	85.846338	10.135066986
1915	.80	85.846338	8.700583881
1916	.80	85.846338	7.469132663
1917	.80	85.846338	6.411976886
1918	.80	85.846338	5.504447362
1919	.80	85.846338	4.725366498

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1920	.80	85.846338	4.056554105
1921	.80	85.846338	3.482403156
1922	.80	85.846338	2.989515590
1923	.80	85.846338	2.566389664
1924	.80	85.846338	2.203151550
1925	.80	85.846338	1.891324931
1926	.80	85.846338	1.623633196
1927	.80	85.846338	1.393829645
1928	.80	85.846338	1.196551711
1929	.80	85.846338	1.027195828
1930	.80	85.846338	.881810005
1931	.80	85.846338	.757001599
1932	.80	85.846338	.649858153
1933	.80	85.846338	.557879427
1934	.80	85.846338	.478919060
1935	.80	85.846338	.411134476
1936	.80	85.846338	.352943893
1937	.80	85.846338	.302989408
1938	.80	85.846338	.260105312
1939	.80	85.846338	.223290885
1940	.80	85.846338	.191687049
1941	1.11	80.890062	.155055773
1942	1.42	76.205702	.118161340
1943	1.73	71.779127	.084815178
1944	2.04	67.596896	.057332428
1945	2.35	63.646234	.036489932
1946	2.66	59.914992	.021862940
1947	2.97	56.391626	.012328867
1948	3.18	54.117348	.006672056
1949	3.49	50.918314	.003397298

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1950	3.80	47.898992	.001627272
1951	3.90	46.961761	.000764195
1952	4.00	46.041920	.000351850
1953	4.10	45.139167	.000158822
1954	4.20	44.253201	.000070284
1955	4.30	43.383725	.000030492
1956	4.39	42.615055	.000012994
1957	4.48	41.859304	.000005439
1958	4.57	41.116258	.000002236
1959	4.65	40.466280	.000000905
1960	4.73	39.826045	.000000360
1961	4.73	39.826045	.000000144
1962	4.73	39.826045	.000000057

Table 7 presents the results of my analysis on the assumption that the proportion of blacks in Kings county was indicated by the census data for each year. Again, column 1 represents the year, column 2 is the assumed percentage of blacks for that year [one-half that indicated by the census data and used in the development of Table 6], column 3 is the probability [expressed as a percentage] that a jury of 19 non-blacks could be selected at random for that year and column 4 represents the probability [expressed as a percentage] that all juries formed from 1900 thru the year shown would be comprised entirely of non-blacks if selection had been made each year on a purely random basis.

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1900	.40	92.667497	92.667496867
1901	.40	92.667497	85.872649757
1902	.40	92.667497	79.576035023
1903	.40	92.667497	73.741119762
1904	.40	92.667497	68.334049846
1905	.40	92.667497	63.323453500
1906	.40	92.667497	58.680259289
1907	.40	92.667497	54.377527438
1908	.40	92.667497	50.390293535
1909	.40	92.667497	46.695423683
1910	.40	92.667497	43.271480279
1911	.40	92.667497	40.098597632
1912	.40	92.667497	37.158366704
1913	.40	92.667497	34.433728302
1914	.40	92.667497	31.908874095
1915	.40	92.667497	29.569154903
1916	.40	92.667497	27.400995693
1917	.40	92.667497	25.391816826
1918	.40	92.667497	23.529961061
1919	.40	92.667497	21.804625930
1920	.40	92.667497	20.205801050
1921	.40	92.667497	18.724210054
1922	.40	92.667497	17.351256766
1923	.40	92.667497	16.078975320
1924	.40	92.667497	14.899983951
1925	.40	92.667497	13.807442161
1926	.40	92.667497	12.795011032
1927	.40	92.667497	11.856816448
1928	.40	92.667497	10.987415010
1929	.40	92.667497	10.181762460

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1930	.40	92.667497	9.435184409
1931	.40	92.667497	8.743349217
1932	.40	92.667497	8.102242861
1933	.40	92.667497	7.508145650
1934	.40	92.667497	6.957610635
1935	.40	92.667497	6.447443617
1936	.40	92.667497	5.974684612
1937	.40	92.667497	5.538590676
1938	.40	92.667497	5.130619991
1939	.40	92.667497	4.754417119
1940	.40	92.667497	4.405799335
1941	.55	89.965520	3.963700279
1942	.71	87.338294	3.461828207
1943	.86	84.783865	2.935071761
1944	1.02	82.300323	2.415573550
1945	1.17	79.885810	1.929700489
1946	1.33	77.538508	1.496260975
1947	1.48	75.256650	1.126035882
1948	1.59	73.747179	.830419696
1949	1.74	71.571241	.594341684
1950	1.90	69.456220	.412807266
1951	1.95	68.786683	.283956426
1952	2.00	68.123262	.193440381
1953	2.05	67.465908	.130506310
1954	2.10	66.814566	.087197225
1955	2.15	66.169184	.057697692
1956	2.19	65.593393	.037845874
1957	2.24	64.022353	.024608278
1958	2.28	64.456023	.015861517
1959	2.32	63.956545	.010144478

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1960	2.36	63.460735	.006437761
1961	2.36	63.460735	.004085450
1962	2.36	63.460735	.002592657

The results of my analysis that there is almost no probability that all of the juries from 1900 thru 1962 could have been formed without any blacks. As shown in Table 6, the probability that all juries formed from 1900 thru 1962 would be all non-blacks is 57 out of 100,000 million, if all the jury selections had been made on a purely random basis. As shown in Table 7, the probability that all juries formed from 1900 thru 1962 would be all non-black is less than 3 out of 100,000 even if the census data overstated the proportion of blacks twofold each year.

Sincerely,

Donald W. Parkyn
Consulting Actuary

THE ORDER TO SHOW CAUSE ISSUED BY THE DISTRICT COURT ON JANUARY 31, 1979

ORIGINAL
Filed
Jan. 31, 1979

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

BOOKER T. HILLERY, JR., Petitioner,	)	
vs.	)	CIVIL NO. S-78-594
GEORGE SUMNER, Warden, Respondent.	)	

MEMORANDUM

Petitioner, an inmate of San Quentin State Prison, requests leave to proceed in forma pauperis with an application for a writ of habeas corpus. He seeks to challenge the constitutionality of hs confinement, resulting from his Kings County

Superior Court conviction for murder, see Cal. Penal Code §187, on the grounds that: (1) he was denied equal protection of the laws because black persons were systematically excluded from the grand jury which indicted him; and (2) he was convicted by the use of evidence obtained by an illegal search and seizure.[1/]

After reviewing and considering the application for a writ of habeas corpus and the accompanying documents and affidavit in

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1/ On July 26, 1978, petitioner filed an additional pleading by which he purports to raise further challenges to the composition of his juries. The claims presented in that pleading are vague and conclusionary and unsupported by specific factual allegations demonstrating any denial of his constitutional rights. They are, therefore, insufficient to support his request for federal habeas corpur relief. See, e.g., Brown v. Allen, 344 U.S. 443, 458 n.6 (1953); Boehme v. Maxwell, 423 F.2d 1056, 1958 (9th Cir. 1970); Dunn v California Department of Corrections, 401 F.2d 340, 342 (9th Cir. 1968).

/////

forma pauperis, this court has concluded that petitioner should be granted permission to proceed in forma pauperis with this action, that an order to show cause should be issued as to his claim that he was denied equal protection of the laws, and that his application for federal habeas relief must be dismissed as to his claim that he was convicted by the use of evidence obtained by an illegal search and seizure.

Petitioner, a black man, alleges that the grand jury which indicted him was chosen upon the selector's "feeling" for the "better type" of people to serve, and that although 8% to 15% of the population of Kings County was black in the year of his indictment, no black persons served on the grand jury which indicted him. He further alleges that no black persons had served on any Kings County grand jury since the formation of the county in 1983.

The Supreme Court has long recognized that systematic exclusion of blacks from grand juries solely because of their race denies black defendants in criminal cases equal protection of the laws, see Patton v. State of Mississippi, 332 U.S. 463, 465 (1947), and that a conviction based upon an indictment by a grand jury from which blacks have been discriminatorily excluded cannot stand, see Whitus v. State of Georgia, 385 U.S. 545, 549-50 (1967); Pierre v. State of Louisiana, 306 U.S. 354, 362 (1939).

Evidence showing that no blacks have served on grand juries over a significant period of time has been held by the Court to establish a prima facie case of purposeful discrimination. See Coleman v. Alabama, 389 U.S. 22, 23 (1967) (per curiam); Reece v. State of Georgia, 350 U.S. 85, 88 (1955); Hill v. State of Texas, 316 U.S. 400, 404 (1942). The Court has also recognized

that subjective grand jury selection procedures are susceptible to abuse and thus support a presumption of discrimination raised by the substantial underrepresentation of a particular group. See Castaneda v. Partida, ___ U.S. ____, 97 S. Ct. 1272, 1280 (1977); Turner v. Fouche, 396 U.S. 346, 360 (1970); see also Witcher v. Peyton, 405 F.2d 725, 726-27 (4th Cir. 1969); Quadra v. Superior Court of City and County of San Francisco, 378 F. Supp. 605, 615 (N.D. Cal. 1974).

Petitioner's allegations that his grand jury was chosen on the basis of the selector's "feeling" for the "better type" of people to serve demonstrates such susceptibility, and coupled with the alleged total exclusion of black persons from Kings County grand juries, is sufficient to establish a prima facie case of discrimination in the selection of his grand

jury.[2] This court will, therefore, issue an order to show cause on the issue of whether petitioner was denied equal protection of the laws because black persons were systematically excluded from the grand jury which indicted him.

Petitioner also claims that he was convicted on the basis of evidence obtained by an illegal search and seizure in violation of his Fourth Amendment rights. The Supreme Court has ruled that federal habeas corpus relief may not be granted on the ground that evidenceintroduced at trial was obtained in an unconstitutional search or seizure if the state has provided an opportunity for a full and fair hearing of the Fourth Amendment

---

[2] A showing that disparities between the black population and the number of blacks on jury lists resulted in part from the use of subjective criteria (disqualifying persons for being "unintelligent" and not "upright") has been found sufficient to establish a prima facie case of discrimination. Turner v. Fouche, supra at 360.

claim. Stone v. Powell, 428 U.S. 465, 494 (1976). Petitioner has alleged no facts showing that he did not have an opportunity for a full and fair hearing on his Fourth Amendment claim in the state courts and, therefore, the court will dismiss petitioner's application for a writ of habeas corpus insofar as it challenges the constitutionality of his confinement on the ground that he was convicted by the use of illegally seized evidence.

IT IS THEREFORE ORDERED that petitioner's request for leave to proceed in forma pauperis with this action is hereby granted.

IT IS FURTHER ORDERED that the respondent above-named show cause by a return in writing on or before twenty days from the date hereof why a petition for a writ of habeas corpus should not be granted on the ground that petitioner was denied equal

protection of the laws due to the systematic exclusion of blacks from the grand jury which indicted him, which return shall be filed with the Clerk of this Court at the United States Courthouse, Sacramento, California, and that a copy of the petition and this Order be served upon the Attorney General of the State of California or his representative therein.

IT IS FURTHER ORDERED that petitioner's application for a writ of habeas corpus is hereby dismissed insofar as it challenges the constitutionality of his confinement on the ground that he was convicted on the basis of evidence obtained in violation of his Fourth Amendment rights.

DATED: January 31st, 1979.

/s/T. J. Mac Bride

Office-Supreme Court, U.S.
FILED
MAY 20 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-836

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

BRIEF ON THE MERITS

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91 pp

QUESTIONS PRESENTED

1. Was it error for the District Court to apply a rule of *Per Se* reversible error to a case of discriminatory grand jury selection where there is overwhelming evidence of the defendant's guilt and where the defendant received a full and fair trial?

2. Did respondent fail to exhaust his available state remedies by significantly changing the evidentiary basis of his claim for relief without ever presenting this new evidence to the state courts?

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No. 84-836

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

BRIEF ON THE MERITS

OPINIONS BELOW

The majority and dissenting opinions of the Ninth Circuit Court of Appeal affirming an order of the United States District Court for the Eastern District of California were filed on May 14, 1984. These

opinions are reproduced as Appendix "A" to the petition for a writ of certiorari filed in this Court. A timely petition for rehearing and a suggestion for rehearing en banc was thereafter field in the Ninth Circuit Court of Appeal. That court filed an order denying rehearing on September 12, 1984. The opinion is denying rehearing reproduced as Appendix "B" to the petition for a writ of certiorari.

JURISDICTION

Petitioner asserts jurisdiction under 28 United States Code section 1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution,

Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

The Grand Jury of Kings County returned an indictment on June 27, 1962, charging respondent Booker T. Hillery with a violation of California Penal Code section 187 in that on or about the 21st of March, 1962, respondent did willfully, unlawfully,

and feloniously murder Marlene Miller (CT 1). [1]

On July 16, 1962, respondent, through his attorney, made a motion to quash the indictment. The motion alleged that members of respondent's race had been systematically and purposely excluded from the Grand Jury which indicted him (CT 26, 28).

Respondent's motion was heard, considered, and denied on July 31, 1962 (CT 41).

On November 16, 1962, the jury returned a verdict of guilty as to the charged offense and fixed the degree at first degree murder (CT 75). On November 20, 1962,

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1. Hereafter "CT" refers to the Clerk's Transcript prepared in connection with the appeal of respondent's first state court trial; "RT" refers to the Reporter's Transcript prepared in connection with the appeal of respondent's first state court trial; "CR" refers to the Clerk's Record for the Ninth Circuit appeal in this case.

the jury returned a verdict fixing respondent's penalty at death (CT 132).

On November 26, 1962, the court imposed a judgment of death (CT 145).

An automatic appeal to the California Supreme Court followed pursuant to section 1239(b) of the Penal Code.

On May 3, 1965, the California Supreme Court filed an opinion affirming the guilt phase of respondent's trial but reversed imposition of the death penalty. (People v. Hillery (1965) 62 Cal.2d 692.)

Respondent was to be subsequently given two additional penalty trials with each resulting in imposition of a death sentence. (See People v. Hillery (1967) 62 Cal.2d 795, cert. en., 87 S.Ct. 958 (1967); In re Hillery (1969) 71 Cal.2d 857; People v. Hillery (1974) 10 Cal.3d 897.)

In January of 1978, respondent filed a habeas corpus petition in the Marin

County Superior Court alleging that blacks had been excluded from the grand jury which indicted him (CR 1). Respondent relied upon the record of his original motion to quash to support his claim of purposeful discrimination.

In March of 1978, respondent filed a petition for writ of habeas corpus in California's First District Court of Appeal and in April of 1978 respondent filed a petition for a writ of habeas corpus in the California Supreme Court (CR 1). On each occasion, respondent did not offer any new evidence and instead relied on the record of his original trial.

The instant petition was originally filed in the United States District Court for the Northern District of California on May 22, 1978. In the original petition, respondent again relied exclusively upon the

state court record and did not seek an evidentiary hearing in federal court.

The case was then transferred to the Eastern District on October 31, 1978.

On January 31, 1979, the District Court, per Judge MacBride, issued an order to show cause. The court's order granted respondent permission to proceed in forma pauperis. The court found that respondent's allegations were sufficient to state a prima facie case of systematic exclusion (CR 2).

The term "prima facie" has been used in two contexts in the instant case. In its first context, this term refers to the sufficiency of the allegations of the petition for a writ of habeas corpus and the court's decision as to whether to issue an order to show cause. Used in this context, the test is whether the petitioner's allegations and the evidence offered in support thereof warrant issuing an order to

show cause. An order to show cause will be issued where petitioner has made a prima facie showing in support of his claim for relief.

Secondly, the term "prima facie case" has a more specialized meaning within the body of jury discrimination law. Here, "prima facie case" refers to the ability of the party claiming systematic exclusion to meet his burden of proof by showing that there has been such exclusion. Such a showing operates to shift the burden of proof of the state to explain why there has been systematic exclusion. If the state is unable to rebut the prima facie case, the writ should be granted if the trial court, upon reviewing all of the evidence, feels that petitioner has established systematic exclusion.

The State's return to the order to show cause was filed on March 22, 1979 (CR 4).

In the return, petitioner acknowledged that respondent had exhausted his state remedies as to the claims presented in the petition but denied that respondent was entitled to relief.

On April 23, 1979, respondent Hillery filed a traverse to the return to the order to show cause. In his traverse, respondent requested an evidentiary hearing (CR 5).

On September 13, 1979, Volume I of the reporter's transcript and Volume I of the clerk's transcript from respondent Hillery's direct appeal to the California Supreme Court were lodged with the District Court by petitioner.

On March 27, 1980, the district court, per Judge Karlton, issued an order updating the status of the case. This order vacated the portion of the original order to show cause which held that respondent's

allegations were sufficient to establish a prima facie case of discrimination. In the order, the parties were directed to supplement and clarify the state court record which the district court found to be "silent or unclear as to a number of relevant issues." (CR 8, p. 2.) In ordering enlargement of the record, the district court held that rule 7(a), 28 United States Code, following section 2254, permits expansion of the state court record to supplement and clarify that record (CR 8).

The order found that the state court record was silent as to which portion of the black population in Kings County was eligible for grand jury service and held that it was the State's responsibility to reduce general population statistics into "more refined figures." The district court's order also indicated that the record was silent on the application of "statistical probability

theory" to the historical facts of the case. The district court indicated in its order that such an analysis was relevant under the case law and "may" be of substantial assistance to the court.

The order directed a status conference to be held on May 27, 1980, with each party's status conference report being due not later than three days prior to the conference.

Finally, the district court's March 27, 1980, order also denied respondent Hillery's application for bail and appointed counsel to represent him (CR 8).

On May 21, 1980, respondent filed his status conference report; petitioner's report was filed on May 23, 1980. A status conference was conducted on May 27, 1980 (CR 12-13).

Respondent's answers to the Court's interrogatories were filed on June 19, 1980 (CR 18).

Petitioner filed partial answers to the Court's interrogatories on June 19, 1980, and that same day petitioner filed a motion to dismiss the petition; a motion for reconsideration of the order of March 27, 1980; and a request for a stay in responding to the remainder of the Court's interrogatories (CR 16-17).

On June 25, 1980, respondent filed supplemental answers to the Court's interrogatories (CR 19).

On August 7, 1980, the district court issued a published order denying petitioner's motions (CR 21). (Hillery v. Sumner (E.D. Cal. 1980) 496 F.Supp. 632.)

Petitioner's answers to the Court's interrogatories were filed on August 27, 1980 (CR 22).

On December 8, 1980, the district court issued an order setting the matter for a status conference on February 11, 1981.

Each party filed timely status conference reports prior to the conference date (CR 23-24).

On March 4, 1981, the district court issued a status conference order. The court set the matter for a two-day evidentiary hearing on September 1, 1981, on the issue of whether respondent could establish a prima facie case of discrimination. A prehearing conference was set for August 3, 1981. Discovery was left open except that it was to be completed prior to the prehearing date (CR 25).

On April 8, 1981, respondent filed and served his first set of interrogatories on petitioner (CR 26).

On May 19, 1981, the State filed and served its first set of interrogatories on respondent (CR 28).

On July 17, 1981, the court issued an order vacating both the prehearing conference date and the hearing date (CR 29).

The court set the matter for a further status conference on September 28, 1981 (CR 29).

At the status conference conducted on September 28, 1981, the State stipulated that if Hillery's new evidence was determined to be admissible, it would be sufficient to state a prima facie allegation which would warrant issuing an order to show cause on his systematic exclusion claim. At the conference, respondent indicated that he was willing to submit the case to the district court on the basis of documents and affidavits and without live testimony. Although petitioner argued that an

evidentiary hearing was unnecessary, it was also argued in the alternative that if new evidence was to be received by the Court, the State was entitled to a full evidentiary hearing (CR 31).

In its order of September 29, 1981, which followed the status conference, the district court directed respondent to prepare a proposed stipulation which was to have attached to it all of the documents which would support respondent's claim of systematic exclusion. The stipulation was to include those matters which petitioner agreed could be submitted to the district court on documents alone (CR 31).

Within fourteen days, petitioner was to file a response on the question of why an evidentiary hearing was necessary as to any matters which were not covered by the stipulation.

The stipulation was filed on or about October 14, 1981. In that stipulation, the parties agreed:

1) that respondent had evidence which was attached to the stipulation which demonstrated a prima facie case sufficient to warrant issuance of an order to show cause;

2) that an evidentiary hearing was required to establish the facts of respondent's case wherein petitioner would have the opportunity to cross-examine respondent's witnesses; and

3) that by agreeing to the above two items, the State was not waiving any objections they had to the admissibility of any "new evidence offered by

Mr. Hillery in support of his claim for relief" (CR 32).

On November 10, 1981, the State filed a notice of motions and motions for dismissal of petition for failure to exhaust as to the newly discovered and recently produced evidence and for summary denial of the petition (CR 36).

Respondent filed his opposition to the motion on or about November 30, 1981 (CR 37).

Petitioner filed a reply brief on December 7, 1981 (CR 38).

On March 9, 1982, the district court filed a published opinion denying the State's motion. The court held, inter alia, the respondent's allegations were sufficient to support a prima facie case and preclude the summary dismissal of the petition (CR 39). (Hillery v. Pulley (E.D. Cal. 1982) 533 F.Supp. 1189.)

Petitioner's answer was filed on March 24, 1982 (CR 40).

On March 30, 1982, petitioner filed a notice of motion and motion for an order permitting an interlocutory appeal under 28 United States Code section 1292(b) (CR 41). This motion was denied on April 19, 1982 (CR 43a).

The court further ordered that an evidentiary hearing be conducted on April 28, 1982.

The evidentiary hearing was conducted on April 28 and 29, 1982. Submission of the case was deferred to allow depositions to be taken of several elderly witnesses who resided in Kings County (CR 51, 52).

On June 3, 1982, petitioner filed closing arguments (CR 53).

On May 12, 1983, the district court issued its published 54-page opinion granting

the petition for a writ of habeas corpus (CR 56). (Hillery v. Pulley (E.D. Cal. 1982) 563 F.Supp. 1228.)

The State filed timely notice of appeal on May 25, 1983 (CR 58).

STATEMENT OF PERTINENT FACTS

A. Facts of the Offense

Although the district court held that the facts of the offense were irrelevant to respondent's contention regarding the selection of the 1962 Kings County Grand Jury, there is case law and commentary which suggest that a federal habeas corpus petitioner's guilt may not be a totally irrelevant consideration. [2/]

A detailed factual account of the offense may be found in the 1965 opinion of the California Supreme Court in People v. Hillery (1965) 62 Cal.2d 692 which affirmed the guilt phase of respondent's state court murder conviction but which reversed his first death penalty sentence.

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1. See Friendly, Is Innocence Irrelevant? Collateral Attach on Criminal Judgments, 38 U.Chi.L.Rev. 142, 170; United States ex rel. Barksdale v. Blackburn (5th Cir. en banc, 1981) 635 F.2d 1115.)

The guilt phase of respondent's trial was not reviewed again on direct appeal but two subsequent death penalty judgments were overturned and respondent's third death sentence was finally commuted to life imprisonment by virtue of the California Supreme Court's decision in People v. Anderson (1972) 6 Cal.3d 628.

A review of these facts makes it difficult to entertain any reasonable doubt that respondent brutally murdered fifteen-year-old Marlene Miller soon after he had been released on parole from an earlier forcible rape conviction. Three separate juries have arrived at this conclusion, including one in Kern County, where the matter was tried in 1972, because of a change of venue. (See People v. Hillery, supra, 10 Cal.3d 897.)

Respondent Hillery entered a plea of not guilty to an indictment charging him

with the murder of Marlene Miller on March 21, 1962. The victim, a fifteen-year-old girl, lived with her parents and brother in a rural area of California's Central Valley, some five miles from Hanford, which is in Kings County, California. On the evening of the crime, Marlene's brother was at work and her parents left at 6:15 p.m. to attend night classes. Marlene remained at home alone to do some sewing. The lights were on, the window shades were up, and the doors were unlocked. At approximately 8:30 p.m., Bev Honegger telephoned the Miller home and conversed briefly with Marlene. When Mr. and Mrs. Miller returned at 9:55 p.m. they found Marlene missing. The television set was playing loudly, the sewing machine light was on, an ironing board was set up, and the iron was hot. In the master bedroom a sleeping bag that was normally stored on a cedar chest was on the floor, as were a coat

and a blanket. A window in the exterior wall of Marlene's room was raised, and the window screen had been removed and was lying outside on the grass.

The police arrived five or ten minutes later in response to Mr. Miller's call and undertook an examination of the entire area. A mashed leaf was found on a trellis near the open window of Marlene's bedroom; and a glove handprint was detected on the top of the television set in front of that window, showing the hand intruding toward the interior of the house. There were scuff marks on the ground outside, which appeared to have been made by the side of a shoe being dragged over the earth. A trail of blood spots led to the bank of a nearby irrigation ditch. Partial footprints were found, and prints of a small tennis shoe.

Marlene's body was discovered the following morning, submerged in an irrigation

ditch some 75 to 100 yards west of the Miller home. Evidencing a source of the trail of blood spots, a pair of large sewing shears bearing the name "Marlene M." was embedded up to the handles in the young girl's chest. The pointed blades had been thrust downward into the body at a point immediately above the sternal notch, puncturing a lung and causing death by massive hemorrhaging and shock. The points of the scissors were lodged in the posterior wall of the chest cavity. A towel and a half-slip were found knotted around her neck. Her wrists were securely tied behind her back with a piece of cord similar to that on the Miller sleeping bag, which had apparently been cut. On one foot she wore a tennis shoe; the other foot was bare. Her blouse was pulled down around her shoulders, pinning her arms to her body. Her brassiere was pulled upwards, exposing her breasts. Her jeans were ripped open down

the back and through the crotch. There were several stab marks on the body where attempts were made to rip the jeans before the final rip was made down the seam. Her underpants were torn, exposing her private parts. Her legs were drawn up and her knees were spread apart. There were bruises on her chin, back, and knees. Marlene was dead, but apparently she had won part of her battle; the external genitalia showed no bruises or other trauma and the hymen was intact.

The Miller home is situated on the corner of Elder Avenue and Tenth Avenue, and there is a stop sign on Elder at this intersection. Approximately two-tenths of a mile to the east on Elder is a dirt road known as Tome Lane. One-half mile to the west of the Miller home on Elder is the Ferreira ranch, where respondent Hillery was employed on the date of the murder, March 21, 1962 (and had been so employed since

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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June 1961). Marlene had worked as a babysitter for the Ferreira family on a number of occasions during the spring of 1962, one of which was shortly before March 21.

At 8:45 p.m. on the day of the crime, a high school student noticed respondent's automobile, 1952 Plymouth with an unusual paint combination, parked on Tome Lane just off Elder. A second witness saw respondent's car in that location at about the same time. Tire marks were found in the lane after the murder; they were photographed, and ink impressions were made of the tires on respondent's car. Expert testimony established that the marks in the lane had been made by the tires on respondent's car.

A right and a left bootprint were found in Tome Lane near the tire marks. The position of the prints indicated that the

wearer had been walking in the direction of the Miller home. Expert testimony established that the prints were made by respondent Hillery's boots. There were also stockinged footprints nearby, leading back towards the place where the car was parked.

A pair of mismatched black gloves were found in the weeds "at the edge of the road" along Elder Avenue, to the east of Tome Lane. When found, they were soaking wet. The gloves were traced to respondent Hillery by the following evidence:

The right-hand glove 'People's Exhibit 34) was black with a red orlon lining, and was similar in appearance and size to a pair sold to respondent sometime before Christmas 1961 by Correll Hicks. Respondent paid for the gloves in the presence of Allean Stallworth, respondent's girlfriend. The latter corroborated Hick's testimony, and stated that Hillery later

showed her the gloves and said they were the pair he had bought from Hicks. She further testified that she knew of no other gloves with a red lining owned by Hillery; that about a week before March 21, 1962, respondent told her that he had lost one of a pair of gloves; and that the remaining glove, which he showed her, looked like People's Exhibit 34.

The left-hand glove found on Elder Avenue (People's Exhibit 33), a leather outer glove suitable for wearing over a lining, was identified as similar in appearance to those sold by an army surplus store in Hanford. The manager of that store testified that respondent Hillery had been a customer of his; that on January 22, 1962, he wrote out a sales slip in the amount of $1.29 plus tax; and that gloves similar to People's Exhibit 33 were on sale at that time in his store for $1.29 a pair. The sales slip (People's

Exhibit 67) was found in the back seat of respondent's car after his arrest.

Respondent's employer, Joe Ferreira, testified that some two weeks prior to March 21, Hillery complained of losing a glove; that the remaining one, which respondent showed him, was similar to Exhibit 34; and that respondent thereafter wore the latter in a mismatched pair with a glove similar to Exhibit 33.

A narrow brown belt (People's Exhibit 35) was also found in the weeds on Elder, near the gloves. By contrast with the latter, the belt was not wet. Mr. Ferreira testified that the belt looked just like one used by respondent to hold up hip boots that he wore at work. Among other identifying points of similarity, the belt bore two marks where the hip boots were supported. There was expert testimony that the marks could

have been caused by heavy objects such as respondent's hip boots.

Respondent Hillery was arrested in his car on the morning of March 22, 1962, in front of the Royal Hotel in Hanford, where he resided. His wallet was examined and was found to contain in one compartment a crisp $10 bill and five $1 bills. Marlene's brother testified that the $10 bill was "very similar" in texture to a $10 bill taken from his dresser on the night of the crime, and that one of the $1 bills was also taken from the dresser. He further testified that a mug partially full of nickels had been emptied by the intruder; a snap purse in Hillery's pocket was found to contain, among other coins, ten nickels.

At the time of his arrest, Hillery was asked where he had been the night before. He answered that he had picked his girlfriend up at 8:30 p.m. and had spent the rest of the

night with her in his hotel room. The girlfriend, Allean Stallworth, likewise told the officers that respondent had picked her up at 8:30 p.m.

In subsequent statements to the police, and in his trial testimony, respondent told a different story. He stated that he left the Ferreira ranch at about 8:15 p.m. on March 21 and drove straight into town, following in his car behind that of Frank Costa, a fellow employee; that at about 8:40 p.m. he parked across the street from the Royal Cafe and Hotel; and that he then went up the hotel stairs to his room where he remained for a couple of hours, cleaning, and washing up. Each significant aspect of this story, however, was contradicted by other witnesses.

Frank Costa testified that although he drove away from the ranch with respondent's car behind him, he no longer saw

respondent's headlights after he had turned the corner of Elder and Tenth (i.e., the location of the Miller home); that he released his gas pedal for 10 to 15 seconds and looked back several times, but did not see Hillery following him. Rose Kendall, proprietress of the Royal Cafe, testified that it was her habit to observe the cars on the street near her establishment, that she did so between 8:30 p.m. and 10 p.m. on March 21, but did not see respondent's car parked on the street until about midnight. Mrs. Tom Sunoo, manageress of the Royal Hotel, testified that during the evening of March 21 she was seated as usual in her office in a chair facing the head of the hotel stairs, but at no time saw respondent come up those stairs tc his room.

With respect to the remainder of the evening, respondent admitted that at about 10 p.m. he entered a laundromat in

Hanford and placed his work clothes and his white leather jacket in a washing machine; that he telephone Mrs. Stallworth from that location at 10:10 p.m., and that he picked her up at her apartment at about 10:20 p.m. (rather than 8:30 p.m., as he had originally told the police). They bought some food at a drive-in restaurant, removed his clothes from the laundromat, left his leather jacket at Mrs. Stallworth's apartment, and spent the rest of the night in his hotel room. The next morning the police found respondent's leather jacket, still damp, hanging over a heater in Mrs. Stallworth's apartment.

Respondent explained the need for washing his clothes that evening by saying that he had been spattered with cow manure while doing the milking at the Ferreira ranch. But Frank Costa, who milked the cows with respondent, testified that there was no manure on respondent's clothes when he left

the ranch that evening. Mr. Ferreira testified that to his knowledge respondent never wore his white leather jacket while he did farm work, but would hang it in the supply room where he kept his boots and work clothes. Mrs. Stallworth testified that she did respondent's laundry during the months of January, February, and March of that year; that respondent gave her his clothes to wash on Thursday of the week preceding the crime, and that she returned them to him on March 21; that in the nine months she had been respondent's girlfriend she had never known him to take his own laundry to the laundromat and wash it himself, and that she had never known him to put his white leather jacket in a washing machine.

On cross-examination, respondent admitted that he had a prior felony conviction for forcible rape.

B. Facts Produced at Respondent's Original State Court Motion to Quash the Indictment

Respondent raised the issue of systematic exclusion of black persons from the grand jury which had indicted him in a pretrial motion to set aside the indictment pursuant to California Penal Code section 995 which was dated July 16, 1962 (CT 11, 23, 26; RT 15). Supporting and opposing affidavits were filed. An evidentiary hearing and arguments were held on July 16 and 31, 1962 (CT 28-41; RT 6, 15). All of the material from the state court record which relates to respondent's motion to quash was provided to the District Court in connection with the petition for federal habeas corpus relief.

In his direct appeal from the judgment of conviction, respondent challenged the trial court's ruling on his motion to quash. In affirming this conviction, the California Supreme Court made a series of

factual findings which petitioner now contends are binding on the federal courts pursuant to Sumner v. Mata (1981) 449 U.S. 539.

The California Supreme Court specifically found that:

> "Defendant [respondent] sought to prove that no Negro had served on a Kings County grand jury since 1893, the year in which the county was organized. The People did not dispute this fact, but introduced evidence based on official census records establishing that in 1960 Negroes constituted only 5.1 percent of the total population of Kings County, and that prior to World War II the proportion had been 1 percent or less. It was also shown that Negroes had often served on petit juries in Kings County (and defendant does not complain of the fact that there was no Negro on the jury that tried and convicted him). The county clerk testified that it was her duty to check the proposed grand jury list against the voters' registration affidavits to determine whether any persons therein named were disqualified by statute, but that such affidavits bear no indication as to the race of the voter; she further testified that during her tenure in office (since 1953) no

member of the board of supervisors or judge of the superior court had ever requested her to determine the race of a prospective grand juror.

"In the court of the hearing on the motion to quash, the trial judge spoke at length on the subject of his method of selecting grand juries since he took office in 1956, and subsequently ordered that such statements be considered as his testimony. He said that in selecting a panel he 'always endeavors on each one of those [judicial] districts to get a good cross section of people who will be qualified to serve as Grand Jurors'; that he had consistently 'tried to get a distribution of racial descents, tried to get both sexes represented, tried to get occupations, farmer [sic], business men and various other types so it will be real -- a real representative group of people, of the better type'; and that since 1956 he had not had a Negro on the panel 'not through lack of desire, but purely through lack of ability to find one that the Court feels would make a proper Grand Juror.' The judge pointed out that he had previously asked defendant's counsel to suggest the names of Negro residents who might be qualified to serve, and had considered selecting a Mr. Lloyd Welcher but declined to after determining that the duties would interfere with the latter's regular

> employment. Finally, it was shown that in Kings County 'rarely is any of the grant jury's time devoted to hearing evidence of criminal offenses,' and that in the decade evidence of criminal offenses,' and that in the decade ending in 1962 more than 1,000 prosecutions were initiated by information while four were initiated by indictment and only one of the later was against a Negro." (People v. Hillery, supra, 62 Cal.2d at pp. 709-710.)

Kings County was formed in 1893 and had only one superior court judge. Judge Meridith Wingrove took the bench in 1956, and was on the bench in 1962 when respondent was indicted.

From 1900 until 1962 either California Code of Civil Procedure (CCP) section 206, or California Penal Code (Pen. Code) section 899, required that the superior court apportion its grand jury selections according to the population of the county's four judicial districts.

Until 1915 the statutory qualifications for grand jury service

included a requirement of property ownership. (CCP § 198.)

Until 1972 it was a requirement for grand jury service that a person be 21 years of age. Until 1920 grand jury service was limited to males.

From 1915 until 1962 it was a requirement that a person be a resident of the state and county for one year before being eligible for grand jury service. (CCP § 198.) There were also disqualifications because of the conviction of a felony and because of a lack of United States citizenship. (Pen. Code, § 893.) To be eligible for grand jury service persons had to have sufficient knowledge of the English language and had to be of ordinary intelligence. (CCP § 198.) Persons serving on the grand jury were to be of fair character, approved integrity, and had to have sound judgment. (Pen. Code, § 897.)

Persons who had served on a grand jury during the previous year and those service on trial juries were also disqualified from grand jury service. (Pen. Code, § 893.)

There were also a number of statutory exemptions from grand and trial jury service which included ministers of the gospel, teachers, mail carriers, military personnel, and certain railroad employees. (CCP § 200.)

Grand jury service in California is for one year with only one grand jury being impaneled in the county each year. The grand jury in California performs both civil and criminal functions. In its role as a "watchdog" of county government, the grand jury investigates the various functions of county government and issues a comprehensive yearly report which details its findings and often included recommendations for changes. (See 20 U.C.L.A. L.Rev. 581 (1973).)

C. Facts Produced at the Federal Evidentiary Hearing

Over the State's strenuous objections, the District Court conducted an evidentiary hearing on April 28-29 of 1982. To accommodate two elderly witnesses who had hardships, the court allowed the testimony of these witnesses to be taken by deposition.

The evidentiary hearing conducted in this matter reaffirmed the State's earlier assertions that any attempt to try a 20-year-old factual dispute would be virtually impossible.

Three of the witnesses respondent called at the federal evidentiary hearing were older black people who had been long-time residents of Kings County. Each of these witnesses had previously submitted declarations under penalty of perjury attesting inter alia to the fact that they knew the qualifications for grand jury

service and knew there were black persons in Kings County who met these qualifications. However, when they testified in person each said they did not know the qualifications for grand jury service.

These witnesses testified that black people had served on the county's trial juries. There was also testimony that black people served on trial juries before respondent's 1962 indictment. Each witness acknowledged that prior to the late 1940's, the Kings County black population was extremely small. Before the second world war, blacks were generally involved in farm work and traveled throughout the county to get jobs. Prior to the late 1940's most of the black people in Kings County lived on farms spread throughout the county. After the postwar influx of blacks into the county, the urban population of blacks grew, primarily in the county's largest city, Hanford.

One of the attorneys in the firm representing respondent in the federal proceedings testified that he selected certain census data from each decennial census from 1900 through and including 1960 which he felt estimated the population of eligible blacks in Kings County.

For the critical two decades of 1960 and 1950, respondent's counsel had to again estimate the population of blacks over 21 years old in Kings County since "a breakdown of black males and black females age 21 and over was not available."

Respondent also presented the testimony of a forensic actuary, Mr. Parkyn, who performed a sophisticated computer analysis of the census data provided to him by respondent's counsel. Mr. Parkyn testified that, based on his computer analysis, there was very little probability that 62 all non-

black grand juries could have been selected in Kings County from 1900 until 1962.

Although means were available to do so, Mr. Parkyn did not interpolate each decennial census but instead used a constant figure for each of the ten years within the decade.

Most importantly, Mr. Parkyn testified that his analysis could not prove intent but merely proved probability. Furthermore, Mr. Parkyn testified that only 19 black persons would have served throughout the 62 years between 1900 and 1962 if the selection system had been perfectly random.

Based on this newly developed evidence, the District Court reversed a twenty-year-old first degree murder conviction supported by three separate jury verdicts.

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ARGUMENTS

I

INTRODUCTION

Respondent, a life-term inmate now confined at San Quentin State Prison, is proceeding in forma pauperis with appointed counsel. He has obtained a writ of habeas corpus pursuant to 28 United States Code section 2254. In his writ he successfully challenged the constitutionality of his 1962 Kings County Superior Court conviction for first degree murder (Pen. Code, § 187), on the grounds that he was denied equal protection of the laws because blacks were systematically excluded from the grand jury which indicted him.

On May 12, 1983, the District Court granted respondent Booker T. Hillery's petition for writ of habeas corpus and subsequently the State of California was ordered to file a new charging document

within ninety (90) days or release Mr. Hillery from custody.

Thus, twenty years after the denial of his original motion to quash the indictment which charged him with murder, respondent filed a habeas corpus petition in the federal courts which alleged that there had been purposeful discrimination against members of his race since no black person had been selected for or served on the Kings County Grand Jury from 1883 until 1962, when he was indicted for murder.

The District Court conducted an evidentiary hearing and after making several crucial factual and legal findings, respondent's 20-year-old murder conviction was reversed.

The District Court first found that the presumption of correctness created by 28 United States Code section 2254 did not apply to this case because:

(1) respondent supposedly had not received a full or fair hearing in the state court because the judge who heard his motion to quash was also the person who selected grand jurors, and because

(2) the California Supreme Court allegedly did not make any factual findings within the meaning of Sumner v. Mata, supra, 449 U.S. 539.

The district court then applied the prima facie case analysis set forth in Castenada v. Partida (1977) 430 U.S. 442 and found that:

(1) blacks comprised an identifiable, distinct and significant class in Kings County between 1956 and 1962;

(2) there was a possibility of abuse in the selection process; and

(3) that there was significant underrepresentation of the class.

To determine whether there was significant underrepresentation in this case, the District Court looked to: (a) the generally accepted standard deviation test; (b) probability theory; (c) and nonstatistical evidence.

In applying the standard deviation analysis, it is a well established rule that courts should be extremely cautious of drawing any adverse inferences from standard deviations in the range of 1 to 3. For the critical years between 1956 and 1962, the total standard deviation in the instant case is only 3.03. The district court nevertheless concluded that this standard deviation suggested that the absence of blacks from the Kings County Grand Jury panels for this six-year period was not due solely to chance or accident.

Turning to probability theory, the district court relied on the testimony of

Hillery's newly discovered expert witnesses to establish that the probability was approximately two-tenths of one percent that random selection would produce a non-black grand jury for the years 1956 to 1962. According to the district court, this expert theoretical evidence "would tend to establish an inference of intentional discrimination." These are the "facts" which led the district court to reverse respondent's twenty-year-old conviction.

It is petitioner's contention that there are other facts which have significance aside from the numbers of blacks who did not serve on the Kings County Grand Jury and that the District Court did not consider these additional relevant facts. Here, there is no assertion of respondent's factual innocence. Mr. Hillery does not claim that he did not brutally murder Marlene Miller. Three separate juries have heard the evidence in

this case and none of them have found that respondent deserved anything less than death for what he had done. Respondent does not claim that the evidence presented to the grand jury was insufficient to bind him over for trial. In fact, the attorney who represented respondent at trial admitted that there was no real doubt that respondent would have been bound over for trial had the indictment been quashed and had he received a preliminary hearing. Most importantly, there is no claim here that Mr. Hillery did not receive a fair trial or that blacks had been systematically excluded from trial juries in Kings County. In fact there is affirmative evidence to the contrary. Furthermore, there is no claim of continuing discrimination in this care. The situation is just the opposite since there is evidence which the district court all but ignored which

suggested that remedial measures had already begun before Mr. Hillery had been indicted.

When these facts are considered, it becomes clear that it is a substantial injustice to reverse Mr. Hillery's 20-year-old murder conviction without any showing that the exclusion of blacks from the grand jury affected the fairness of respondent's trial and in the absence of any assertion of innocence.

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II

IT WAS ERROR FOR THE DISTRICT COURT TO APPLY A RULE OF AUTOMATIC REVERSAL TO A CASE OF PURPOSEFUL DISCRIMINATION WHERE THERE IS OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT; WHERE THE DEFENDANT RECEIVED A FULL AND FAIR TRIAL; AND WHERE THERE IS NO INDICATION OF CONTINUING DISCRIMINATION

Petitioner contends that the time has come to extend the harmless error rule to cases of purposeful discrimination in grand jury selection where the defendant received a fair trial; where the evidence of his guilt is overwhelming; and where there is no continuing history of discrimination.

It is now a well established rule that a criminal defendant "is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." Alexander v. Louisiana (1972) 405 U.S. 625, 628-629.

This Court has enforced this rule since Strader v. West Virginia (1880) 100 U.S. 303.

Historically, those cases in which a conviction was reversed because of discriminatory grand jury selection also involved discrimination in the selection of trial juries. Neal v. Delaware (1880) 103 U.S. 370; see also Bush v. Kentucky (1882) 107 U.S. 110; Gibson v. Mississippi (1895) 162 U.S. 565; Hale v. Kentucky (1937) 303 U.S. 613.

However, this Court has also recognized in Chapman v. California (1967) 386 U.S. 18 and that all federal constitutional errors do not warrant automatic reversal of a state court conviction.

In an earlier dissent in Cassell v. Texas (1950) 339 U.S. 282, 298, Mr. Justice Jackson had argued that discrimination in the

selection of grand juries could be considered harmless error so long as it could be shown that the defendant received a fair trial.

In Rose v. Mitchell (1979) 443 U.S. 545 this Court attempted to resolve the issue of whether automatic reversal is required in all cases of purposeful discrimination or whether the harmless error test should be applied to such cases. Part II of the Court's opinion in Rose addressed this difficult question.

Rose involved a claim by four black males convicted of murder in a Tennessee state court that their equal protection rights had been violated because there had been purposeful discrimination against blacks in the selection of grand jury foreman.

The opinion of the court in Rose consisted of four parts with part I summarizing the facts of the case.

Part II of the Court's opinion in Rose preserved the draconian rule that where discrimination in violation of the Fourteenth Amendment is proved, the court will "quash the indictment . . . without regard to prejudice" 443 U.S. at 556. [3/]

In writing for the Court Mr. Justice Blackmun acknowledged that "there are costs associated with this approach" 443 U.S. at 557. Despite these costs, the Court in Rose relied heavily upon the possibility of re-trying the defendant as a justification for a rule of automatic reversal. The Court preserved the rigid rule of per se reversal because "we believe such costs as do exist are outweighed by the strong policy the Court consistently has recognized of combating

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3. Parts III and IV of the opinion found that the Court of Appeal erred in finding that there had been purposeful discrimination.

racial discrimination in the administration of justice." Id. at 558.

The entire four part opinion of the Court was only endorsed by three justices (Blackmun, J., Brennan, J., and Marshall, J.).

Two justices (White, J. and Stevens, J.) joined in Part II but dissented from parts III and IV and also dissented from the judgment. Justice Stevens further qualified his support for Part II of the Court's Opinion by filing a separate opinion. In his separate opinion Justice Stevens indicated that had he been a member of the Court when Cassell v. Texas, supra, was decided, he would not necessarily have rejected the arguments set forth in Justice Jackson's dissent but that he felt compelled by stare decisis to join with Part II of the Court's opinion in Rose.

Justice Stewart filed a separate opinion which concurred in the judgment and which also argued that "a claim of discrimination in the selection of a grand jury or its foreman is not a ground for setting aside a valid criminal conviction" 443 U.S. at 579. Justice Rehnquist joined in the opinion of Justice Stewart. In a separate opinion, Justice Powell indicated that claim of discrimination in the selection of grand juries should not be cognizable in federal habeas corpus proceedings where the defendant has had a full and fair consideration of his federal claim in the state courts.

At least one federal court has indicated that Part II of the Rose opinion may not have any precedential value since:

> ". . . Part II of Justice Blackmun's opinion was joined by only two justices who joined in the judgment of the Court and by two dissenters (Justices White and

Stevens), leading Justice Powell to question its precedential value 'for not all of the four Members who join in support even the Court's judgment.' Rose v. Mitchell, supra, 443 U.S. at 582, n. 3, 99 S.Ct. at 3014, n. 3 (Powell, J., concurring). Since 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds,' Gregg v. Georgia, 428 U.S. 153, 169, n. 15, 96 S.Ct. 2909, 2923, n. 15, 49 L.Ed.2d 859 (1976), Justice Powell's point is well taken." (United States ex rel. Barksdale v. Blackburn, supra, 639 F.2d at 1120.)

Rose was followed by the case of Connecticut v. Johnson (1983) 460 U.S. 73, 103 S.Ct. 969. In Johnson this Court again examined the doctrine of "harmless error" as it applies to state criminal prosecutions. In Johnson this Court cited its earlier opinion in Chapman v. California (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, with approval.

As indicated previously, Chapman had established the rule that "some constitutional errors may be considered harmless if the beneficiary of the error proves" beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24.

The Johnson court noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" Connecticut v. Johnson, supra, 103 S.Ct. at 975 (emphasis added).

This Court then went on to note in Johnson the instances where a violation of a criminal defendant's constitutional rights can not be considered to be harmless error. The cases cited included: Gideon v. Wainwright (1963) 372 U.S. 335 (right to counsel at trial); Payne v. Arkansas (1958) 356 U.S. 560 (coerced confession); Tumey v.

Ohio (1927) 273 U.S. 510 (impartial judge). Each case dealt with the fairness of the trial which the defendant had received.

Finally, in 1984 this Court decided the case of Hobby v. United States (1984) ____ U.S. ____; 104 S.Ct. 3093. In Hobby, the petitioner was a white male who had been indicted by a federal grand jury. In a pretrial motion, petitioner alleged that there was discrimination against women and blacks in the selection of grand jury foremen. Petitioner only asserted that his due process rights had been violated and did not allege an equal protection claim.

Petitioner argued that Rose v. Mitchell, supra, supported his claim that discrimination in the selection of grand jury foreman warranted reversal of his conviction.

This Court rejected the argument that Rose required an automatic reversal of the conviction in Hobby.

The instant case raises the issue of whether a 1962 state court murder conviction is subject to a rule of automatic reversal because blacks were systematically excluded from grand jury service more than twenty years ago, despite the fact that blacks had regularly served on trial juries, despite the overwhelming evidence against respondent and without any evidence that the discrimination is continuing.

The danger of a discriminatorily selected grand jury is that its evaluation of the evidence against a defendant may be biased, resulting in an unfounded charging document being filed against him. There is also a danger of an otherwise unnecessary public trial where, if the bias continues, a defendant may be wrongly convicted. However, where the only contention of impropriety in the entire process resulting in a defendant's conviction relates to the selection of the

grand jurors, the indictment is not necessarily erroneous, and most importantly, the integrity of the trial is unaffected. As in Fourth Amendment cases, the retrospective focus on the grand jury selection process distracts attention from the crucial inquiry of whether the defendant has had a fair and unbiased trial wherein an appropriately constituted trial jury has found him guilty beyond any reasonable doubt. (See Stone v. Powell (1976) 428 U.S. 465, 490.)

In the instant case the district court refused the State's motion to decide whether this particular error could be considered harmless for two reasons. First, the district court felt that application of a "per se reversible error standard" was necessary for deterrence purposes. Second, any application of the harmless error rule was rejected to protect the integrity of the judicial process.

Reversal of the District Court's order granting the writ of habeas corpus is necessary to correct what amounts to an exceptional legal error.

In the words of Justice Jackson, the right of every citizen to insist upon a fair, unbiased and non-discriminatory selection process for grand juries is "unquestionable and should be directly and uncompromisingly enforced" Cassell v. Texas, supra, 339 U.S. at 304.

However, enforcement of these rights does not require a rule of automatic reversal in all cases involving discriminatory grand jury selections.

In United States ex rel. Barksdale v. Blackburn, supra, 639 F.2d 1115, the Fifth Circuit recognized the distinct possibility that unless grand jury discrimination is accompanied by petit jury discrimination "such grand jury discrimination might be

harmless error." Similarly, in the recent case of Hobby v. United States, supra, this Court held that discrimination in the selection of federal grand jury foremen does not always require reversal of a conviction if the defendant has received an otherwise fair trial.

The record in the instant case contained undisputed facts which have significance aside from the numbers of blacks who did not serve on the Kings County Grand Jury. Here, there is no assertion of respondent's factual innocence. Respondent does not claim that he did not brutally murder Marlene Miller. Three separate juries, 36 citizens, have heard the evidence of respondent's guilt and none of them found that Mr. Hillery deserved anything less than death for what he had done. Furthermore, respondent does not claim that the evidence presented to the grand jury was insufficient

to bind him over for trial. In fact, the prominent black attorney who represented respondent at trial admitted that there was no question in his mind that respondent would have been bound over for trial had the indictment been quashed and had he received a preliminary hearing (RT 4/28/82 246). More importantly, there is no claim here that respondent did not receive a fair trial or that blacks had been systematically excluded from trial juries in Kings County. Additionally, there is no claim of continuing disc.imination in this case, and any deterrent purpose purportedly served by reversing this judgment is therefore meaningless. To the contrary, there is affirmative evidence which the District Court all but ignored which indicated that remedial measures to correct the exclusion of blacks from the grand jury had already been initiated <u>before</u> Hillery was indicted.

The charging process in California is also markedly different from that of Tennessee where all criminal prosecutions must begin with an indictment. (Rose v. Mitchell, supra, at p. 548, n. 1.) In California a vast majority of prosecutions are initiated by the complaint process which relies upon a preliminary hearing for a finding of probable cause to conduct a trial. See The Preliminary Hearings in Los Angeles, 18 U.C.L.A. Law Rev. 636, 678, n. 155 (1971). In 1962 the Kings County Grand Jury was even less involved in the charging process than the average California grand jury.

This distinction is important since one of the primary reasons expressed by Justice Blackmun for rejecting application of the harmless error rule to grand jury cases was his understanding of the role played by the indicting grand jury in Tennessee. See

Hobby v. United States, ____ U.S. ____, 104 S.Ct. 3093 (1984).

Realistically, the integrity of our judicial system is not threatened by the process Kings County used to select its grand jury more than twenty-five years ago. However, the reversal of three different jury verdicts each returned after a fair trial, all of which are supported by overwhelming evidence of respondent's guilt, does little to enhance the integrity of the judicial process.

When the totality of those facts are considered, it becomes inescapable that the People of the State of California have suffered a substantial injustice with the reversal of respondent's 20-year-old first degree murder conviction without any showing that the exclusion of blacks from the grand jury affected the fairness of respondent's

trial and in the absence of any assertion of respondent's innocence.

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III

RESPONDENT FAILED TO EXHAUST HIS AVAILABLE STATE REMEDIES SINCE HE SIGNIFICANTLY CHANGED THE EVIDENTIARY BASIS OF HIS CLAIM FOR RELIEF WITHOUT EVER PRESENTING THIS NEW EVIDENCE TO STATE COURTS

To support his claim of systematic exclusion of blacks from the Kings County grand jury, respondent relied primarily upon evidence which was never presented to any of the state courts which have previously been asked to review his claim for relief. In doing so, respondent violated 28 U.S.C. section 2254 which expressly requires exhaustion of available state remedies.

As previously noted, on November 10, 1981, the State filed a motion to dismiss the petition for failure to exhaust as to the newly discovered evidence (CR 36). The district court denied this motion. Hillery v. Pulley, supra, 533 F.Supp. 1189.

This issue was raised by petitioner on appeal and in his dissent in this case Circuit Judge Anderson concluded that:

> "Although petitioner's basic claim has remained the same, the evidentiary basis for that claim changed significantly in the present habeas corpus proceeding from that presented to the state courts years ago." (9th Cir. opinion, 5/14/84; attached as Appendix "B" to the petition for certiorari.)

The state has consistently acknowledged that there was exhaustion as to respondent's claim for relief which was based exclusively on the state court record. This fact remains true.

However, to the extent that respondent sought and obtained relief based on facts which were never presented to any state court, there was no exhaustion of state remedies as required by 28 United States Code section 2254.

Exhaustion of available state remedies is a jurisdictional prerequisite to obtaining federal habeas corpus relief.

It is petitioner's contention that in order to satisfy the express provisions of 28 United States Code section 2254(b) Mr. Hillery should have been required to take his additional evidence back to the state courts to give the state court's the opportunity to rule upon his claims for relief. (La Blanc v. Patterson (D.C. Colo. 1968) 294 F.Supp. 607; U.S. ex rel. Figueroa v. McMann (2nd Cir. 1969) 411 F.2d 915; U.S. ex rel. Galloway v. Fogg (D.C.N.Y. 1975) 403 F.Supp. 248; Camera v. Bombard (S.D.N.Y. 1978) 455 F.Supp. 176.)

Obviously, before a petitioner will be sent back to state court, the new factual material must be more than mere "bits of evidence" and must be the type of evidence which puts the case in a markedly different

posture from that considered at the state court trial. (Nelson v. Moore (2nd Cir. 1972) 470 F.2d 1192, cert. den. 412 U.S. 951.)

Here, both respondent and the district court relied upon a sophisticated computer analysis of statistical evidence to show that there was virtually no chance that the grand jury selection system in Kings County was random. This factual theory is far different from the case he presented to the state courts. Furthermore, respondent presented and relied upon the declarations and testimony of witnesses to establish the competency of black persons to serve as grand jurors in the 1960's and to establish their exclusion from the selection process. These witnesses were never presented to the state courts.

Here, there was a total failure of the exhaustion requirement as to this "new"

evidence and this case should have been dismissed without prejudice pending respondent's exhaustion of his state court remedies.

In opposition this exhaustion argument, petitioner asserted that he was not required to take his new evidence back to the state courts because a district court is empowered to take cognizance of this type of material by simply expanding the record in habeas corpus proceedings pursuant to Rule 7, 28 United States Code section 2254 foll.

Respondent does not dispute the ability of the district court to expand the record, where appropriate, in habeas corpus proceedings.

Neither can it be disputed, however, that a petitioner seeking habeas corpus relief is still under a statutory obligation to exhaust his available state remedies. (28 U.S.C. § 2254(b).)

The balance which must be struck between Rule 7 and section 2254(b) is a matter of degrees.

Whether a particular habeas corpus petitioner will be required to go back to the state courts or remain in the district court appears to depend upon the nature of the supplemental evidence.

When the evidence which was not presented to the state courts does not materially affect the nature of petitioner's case, Rule 7 can be used to expand the record without offendirg 28 United States Code section 2254(b). However, when the evidence which was not presented to the state court is materially different or presents the petitioner's case in a significantly different posture, there is ample authority which holds that the case must be sent back to the state courts.

In rejecting the state's argument on this issue, the majority ignored a substantial body of relevant and binding precedent.

For example, the case of Zicarelli v. Gray (3rd Cir. 1976) 543 F.2d 466 is directly on point and supports the state's position on this issue. (See also Zicarelli v. Dietz (3rd Cir. 1980) 633 F.2d 312, cert. den. 101 S.Ct. 868.)

In the remarkably similar case of Zicarelli v. Gray, supra, 543 F.2d 466, the court held that:

> "For a court to determine a claim that a defendant has not been tried by a jury reflecting a cross-section of the community where the crime was committed, it must be apprised not only of the legal contention, but also of the demographic data supporting the contention. Zicarelli did not make such a proffer to the trial court, nor did he state to the appellate courts that he was ready to present such information to the trial court if the cause was remanded for such purposes. Indeed, the first clear

reference to the demographic data was made in Zicarelli's brief that was filed in the federal court to support his petition for habeas corpus."

The court in Zicarelli v. Gray, supra, went on to dismiss the petitioner's cross-section claim and required the petitioner to exhaust this issue in the state courts. (See Zicarelli v. Dietz, supra, 633 F.2d 312, cert. den., 101 S.Ct. 868.)

This same rule applies in those cases where the habeas petitioner has presented some supporting facts to the state courts but has later asserted different and more compelling factual allegations to the federal courts. (See, e.g., Gurule v. Turner (10th Cir. 1972) 461 F.2d 1083, 1084.)

A rule requiring exhaustion has been endorsed by the Fifth Circuit Court of Appeals in Knoxson v. Estelle (5th Cir. 1978) 574 F.2d 1339. In Knoxson a state prisoner was denied habeas relief by the district

court. After oral argument and submission of the case to the district court, petitioner filed a post-submission brief which contained factual material which had never been presented to the state courts.

The Circuit Court of Appeals held that:

> "The post-submission brief does contain new factual allegations in support of Knoxson's legal plea. With regard to these new facts, we believe that the petitioner has failed to exhaust his state remedies. His petition must be dismissed from the federal court without prejudice to give the state court an opportunity to review these newly surfaced facts in the further proceedings that we expect Knoxson to pursue. See Picard v. Connor, 1971, 404 U.S. 270, 276, 92 S.Ct. 509, 30 L.Ed.2d 438; United States ex rel. Boodie v. Herold, 2 Cir. 1965, 349 F.2d 372; Gurule v. Turner, 10 Cir. 1972, 349 F.2d 372; Gurule v. Turner, 10 Cir. 1972, 461 F.2d 1083; Developments in the Law--Habeas Corpus, 73 Harv.L.Rev. 1038, 1069 (1970) ('. . . evidence . . . clearly crucial to the claim . . . should first be presented to the state if the exhaustion rule is to be an effective one')."

> "This Court believes that the interests of the state of Texas, the federal courts, and the petitioner are best balanced by allowing the state courts to consider this evidence. We therefore vacate the District Court's denial of habeas relief and remand to the District Court with directions to dismiss the suit without prejudice to Knoxson's right to refile the petition if he is dissatisfied with the outcome of any proceedings he brings in the state court." (Emphasis added; see also Paullett v. Howard (3rd Cir. 1980) 634 F.2d 117.)

More importantly, the majority opinion in the instant case appears to be in direct conflict with earlier precedent decided by 9th Circuit itself.

Thus, in Daniels v. Nelson (9th Cir. 1972) 453 F.2d 340, 342, the Court held that:

> "Thus the claim made before the California court and the claim now made can both be said to be that the confession was involuntary. However, the substance of the claim now made is quite different from the substance of the claim made before the California court. As we stated in

> Schiers '[i]t is now wholly transformed by other factual assertions of the petitioner into quite a different problem.' To sustain the present claim, Daniels would have to offer evidence that does not appear in the record made in the state courts, that is, evidence that the police officer promised to release his family if he confessed. Under these circumstances, we agree with the trial court that the question now presented as to the voluntariness of Daniels' confession should be first presented to the California Courts." (See also Schiers v. People of the State of California (9th Cir. 1964) 333 F.2d 173, 175-176.)

Mr. Hillery claims that "throughout the entire proceedings in state and federal court," he has "alleged systematic exclusion of blacks in the grand jury process in Kings County." (CR 37, p. 5.)

The State does not dispute this assertion. The problem with respondent's analysis is that it is far too shallow. While Mr. Hillery's basic claim has remained the same, the evidentiary basis of that claim

changed dramatically after it was filed in the federal court and after a lawyer hired a consulting actuary to apply sophisticated computer techniques to this case.

Instead of relying on the evidence introduced in the state court almost twenty years ago, respondent now relies upon what he claims is a sophisticated computer analysis of the statistical probability that blacks would not have served on the Kings County Grand Jury had the selection been random.

Respondent was also allowed to introduce census material not introduced at the state court trial as well as introducing the testimony of several purported witnesses who did not testify at the original motion to quash which was conducted more than twenty years ago.

Thus, while respondents generic claim has remained the same, the species of

his claim has been drastically mutated into a wholly different animal.

It is not necessary that there be an entirely new and different legal contention raised to justify sending a case back to the state courts under section 2254(b). It is sufficient if the new factual allegations are simply "more compelling." (Gurule, supra.) Where the new factual material "wholly transforms" the case of "materially changes" it, the matter must be returned to the state courts. Here, the district court erred in denying the state's motion to dismiss the petition without prejudice and the district court's order granting the writ must therefore be reversed.

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CONCLUSION

For the foregoing reasons, petitioner requests that the judgment of the district court granting respondent's application for a writ of habeas corpus be reversed.

Respectfully submitted,

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5/17/85

Office Supreme Court, U.S.
FILED
JUL 12 1985
ALEXANDER L. STEVAS,
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(5)

No. 84-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DANIEL VASQUEZ, Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit.

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Respondent had exhausted his State remedies and the evidence presented to the District Court did not significantly change the evidentiary basis of the claim which had previously been presented to the State Courts.

2. The District Court properly applied the *Per Se* rule of reversible error once the State failed to rebut Respondent's prima facie case of discrimination in the Grand Jury selection process.

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OPINIONS BELOW

Respondent concurs in Petitioner's "OPINIONS BELOW" statement and incorporates it as though fully set forth herein.

JURISDICTION

Respondent concurs in Petitioner's statement of "JURISDICTION" and incorporates it as though fully set forth herein.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent concurs in Petitioner's statement of "CONSTITUTIONAL PROVISIONS INVOLVED" and incorporates them as though fully set forth herein.

STATEMENT OF THE CASE

Respondent concurs in Petitioner's "STATEMENT OF THE CASE" and incorporates it as though fully set forth herein, including footnote 1, page 4, which discusses the designators for the various transcripts. These designators will be followed throughout this brief. In addition, the designator RTA will be used to designate the reporter's transcript on appeal to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF PERTINENT FACTS

A. Facts Presented To The California Courts.

On June 27, 1962, Booker T. Hillery was indicted by the Grand Jury of Kings County, California, with violation of California Penal Code section 187, Murder. The indictment charged that on or about the 21st of March, 1962, Booker T. Hillery, did willfully and feloniously murder Marlene Miller (CT 1).

On July 16, 1962, Hillery, through his attorney, Hugh Goodwin, made a motion to quash the indictment. The

motion alleged that members of Hillery's race (Black) had been systematically and purposefully excluded from the Grand Jury which indicted him (CT 26, 28). Hillery's motion was heard, considered and on July 31, 1962, denied (CT 41).

At the hearing on the motion the following information was presented to the Superior Court.

1. Witnesses were called by Hillery to testify to their knowledge as to whether or not Blacks had ever served on a Grand Jury in Kings County California (RT 17 through 100). The testimony covered the years 1916 through 1962 and none could remember knowing or talking to any members of a Grand Jury in Kings County who were Black.

2. Judge Meredith Wingrove stated that he alone selected the members of the Grand Jury from 1956 through 1962 and in 1962, he had found a qualified Black (Mr. Welcher) he could appoint to the Grand Jury panel however, because of Mr. Welcher's employment he did not feel it appropriate to make the appointment. (RT 64).

3. An affidavit by Alice Hanna, Kings County Librarian, was submitted by the District Attorney of Kings County which contained data based on official United States Bureau of Census Statistics for Kings County for the years 1910, 1920, 1930, 1940, 1950 and 1960 (CT 39). These figures told the Court how many Black people lived in the county and what percentage of the total population they accounted for. This affidavit was submitted by the District Attorney to counter the affidavit submitted by Hillery (RT 57 through 59). At RT pages 58 and 59 the District Attorney suggested the Court determine under the affidavits, whether or not these figures constituted a substantial percentage (of Blacks), whether they were qualified and whether the qualified represented

a substantial percentage of the percentage of the Negroes of the total population.

4. The District Attorney presented no evidence to show that Blacks had served on Grand Juries in Kings County California during the entire history of the County since 1893.

On July 31, 1962, the motion was denied (CT 41).

On November 16, 1962, the trial jury returned a verdict of guilty as to the charged offense (CT 75).

In January of 1978, following his appeals from his conviction, Hillery filed a Habeas Corpus petition in the Superior Court of Marin County, California, alleging that Blacks had been excluded from the Grand Jury which indicted him (CR 1). This Habeas petition was ultimately referred to the California Supreme Court where it was denied on April 18, 1978 (CR 1). The California Supreme Court issued its opinion which discussed the evidence presented *supra*, including a statement to the effect that the People did not dispute the fact that no Negro had served on a Grand Jury in Kings County since its inception.

With his State remedies exhausted, he then filed a Title 28, Section 2254 petition in the United States District Court for the Northern District of California on May 22, 1978 (CR 1). On October 31, 1978, the case was transferred to the United States District Court for the Eastern District of California (CR Clerks Index).

On January 31, 1979, the Honorable Thomas J. MacBride, Chief Judge of the United States District Court for the Eastern District of California, issued a Memorandum, ordering that Hillery be permitted to proceed *in forma pauperis* and further ordering that the State of California

respond by show cause order why the petition for writ of habeas corpus should not be granted on the ground that Hillery was denied equal protection of the laws due to the systematic exclusion of Blacks from the grand jury which indicted him (CR 2).

In its response to Chief Judge MacBride's order, the State of California admitted that Hillery had exhausted his State remedies (CR 4).

After a series of motions were filed and ruled on, see Statement of the Case, *supra* the Honorable Lawrence K. Karlton, Chief Judge, Eastern District of California, replacing Chief Judge Thomas J. MacBride, who had retired to Senior status, ordered an evidentiary hearing on the matter. His published opinion is dated March 9, 1982 (CR 39). *Hillery* v. *Pulley,* (E.D. Cal. 1982), 533 F. Supp. 1189.

B. Facts Presented To The Federal Courts.

1. Hillery called Joshua E. Richardson, Evvie Edwards and Oliver F. Folsom to testify as to their knowledge of whether there were qualified Blacks eligible to serve on the Kings County Grand Jury between the time of their arrival in Kings County and 1962. In substance, their testimony was that there were eligible Blacks that could have served on the grand jury but they were never selected (CR 70).

2. Their testimony was corroborated by the deposition testimony of Bessie Welcher and Anne Cole (CR 51, 52), which were taken approximately one week after the evidentiary hearing was held.

3. Hillery utilized the testimony of Mr. Donald Parkyn, a forensic actuary, who testified that based on his probability analysis, there was very little probability that 62 all non-Black grand juries could have been selected in

Kings County between the years 1900 and 1962. Mr. Parkyn's analysis was based on Decennial census data for the years 1900 through and including 1970. The data was provided to him by Hillery's counsel. (RTA 146 and following).

4. The State cross-examined Mr. Parkyn regarding his findings but did not produce an independent expert of its own to refute the findings and analysis of Mr. Parkyn. The State called no witnesses to the stand on their behalf except Mr. Parkyn whom they attempted to use as their expert on recall to the stand (RTA 146 and following).

5. The State produced no evidence to establish that Blacks had served on Grand Juries in Kings County for the years in question.

6. In addition to the foregoing, the District Court had all of the facts which had been presented to the California Courts.

Based on the evidence produced at the hearing together with the deposition testimony, the United States District Court, in a published opinion, granted Hillery's application for a writ of habeas corpus (CR 56), *Hillery* v. *Pulley,* (E.D. Cal. 1983) 563 F. Supp. 1228.

The State of California appealed the decision to the United States Court of Appeals for the Ninth Circuit who affirmed the decision of the District Court in a two-to-one decision. *Hillery* v. *Pulley,* Slip Opinion No. 83-2017 (9th Cir. 1984, For Publication), attached as Exhibit B to the Petition for Writ of Certiorari. J. Blaine Anderson, Circuit Judge, dissented on the basis that Hillery had not exhausted his state remedies.

The State of California filed a petition for re-hearing and re-hearing in banc in the United States Court of

Appeals for the Ninth Circuit which was denied on September 12, 1984.

ARGUMENTS

I

INTRODUCTION

Respondent takes the position that an orderly analysis of Petitioner's claim requires that the so-called "expansion doctrine" under Rule 7(b) of the rules applicable to a Title 28 Section 2254 motion be examined first. This would be followed by an analysis of the application of the *Per Se Rule* versus the *Harmless Error Doctrine* to a case of proven discrimination in the selection of a grand jury.

Respondent asserts that if the Court holds that the District Court erred in applying the expansion doctrine under Rule 7(b), then the law to be applied to the claim of discrimination never arises because the case would be referred back to the California State Courts for further analysis. The law to be applied to the discrimination claim can arise only if this Court decides that Rule 7(b) was properly applied by the District Court. See *Picard* v. *Connor*, 44 U.S. 270 (1971).

Petitioner's "Brief On The Merits," at page 46, suggests that Hillery waited twenty years before filing his habeas petition in the Federal Courts. Nothing could be farther from the truth. An examination of the record demonstrates that Hillery filed his first habeas petition in the Marin County Superior Court on January of 1978 following his appeals from his original conviction. Further, it must be remembered that there were three penalty phase trials, all of which went through the appellate process. The fact is that Hillery was required to take that much time to exhaust his state remedies. The problem of the

delay in filing is considered in *Hillery* v. *Sumner*, 496 F. Supp 632 (1980) (E.D. Cal.) at page 634 and following.

Petitioner expends a considerable amount of time detailing and discussing the evidence presented to the trial jury in an effort to convince this Court that the "evidence of guilt is overwhelming" and there is no claim of innocence. Respondent believes there is no such standard applicable to the claim presented. The standard used by the trial jury to convict Hillery was the usual "proof beyond a reasonable doubt" and all appeals on the guilt issue have been exhausted. Hillery can no longer claim innocence by way of this or any other legal process. Therefore, it appears that petitioner is requesting this Court to fashion a new standard of review when examining the claim of discrimination in the grand jury selection process. That standard would take the form of a review of all the evidence presented to the trier of fact by the reviewing court in addition to his claim of innocence. If the reviewing court decided that the evidence reviewed exceeded the "proof beyond a reasonable doubt" standard and entered into the realm of "overwhelming," then the fact of proven discrimination in the grand jury proceedings would have no relevancy because any error would be "harmless" as it relates to the fairness of the trial and the failure to assert a claim of innocence.

The fact of the conviction is properly before this Court and that conviction is not challenged in these proceedings. The standard by which the trial jury convicted Hillery is not challenged in these proceedings. The volume of evidence, substantial or not, is not in issue in these proceedings. Simply stated, the "per-se rule" applied by the District Court to the proven claim of discrimination did not concern itself with either the volume or type of evidence presented which resulted in the conviction nor any

claim of innocence, but rather, supplied the applicable legal remedy to a proven Constitutional violation.

II

RESPONDENT HAD EXHAUSTED HIS STATE REMEDIES AND THE EVIDENCE PRESENTED TO THE DISTRICT COURT DID NOT SIGNIFICANTLY CHANGE THE EVIDENTIARY BASIS OF THE CLAIM WHICH HAD PREVIOUSLY BEEN PRESENTED TO THE STATE COURTS

Hillery filed the petition under consideration herein on May 22, 1978, and Chief Judge MacBride issued his Show Cause Order on January 31, 1979. Judge MacBride held that Hillery had made out a prima facie case of discrimination in the selection of the Grand Jury which had indicted him for murder.

In its Return to the Order, filed on May 22, 1979, the State, in its verified answer, admitted that Hillery had exhausted his state remedies. See CR 2, Paragraph II. The State agreed that the habeas petition filed in the District Court raised the "same issue(s) now raised were denied in ___ the California Supreme Court (see Petition, p. 3)." Therefore, the State admits that the *claim* remained the same in the Title 28 USC, section 2254 proceedings as it had in the State proceedings.

The evidence which supported the *claim* in the State Courts included (1) census data from 1910 through 1960; (2) testimony from at least two witnesses to the effect no Blacks had ever served on a grand jury in Kings County; (3) Judge Wingrove's statements on how the grand jury was selected; (4) affidavits from the County Librarian; (5) the percentage of Blacks in the total population for the years included in the census data; (6) No evidence from the District Attorney disputing the allegation that no Black had ever served on a grand jury in Kings County; (7)

that in 1960 Blacks constituted approximately 5% of the population in Kings County; (8) Judge Wingrove's statement that he had never selected a Black for grand jury service from 1956 to 1962. Further, the Supreme Court of California discussed the state of the record in its opinion in *People* v. *Hillery*, 62 Cal 2d. 692, 709 (1965), *cert. denied* 386 U.S. 938 (1967).

When Chief Judge Lawrence K. Karlton took over the case on the retirement of Chief Judge Thomas J. MacBride, he concluded that the case was properly before the District Court because of the State's admission that the State Court remedies had been exhausted. He further concluded that it was necessary to supplement and clarify the record in accord with Rule 7, 28 U.S.C. foll. Section 2254. *Hillery* v. *Pulley*, 533 F. Supp. 1189 (1982) (E.D. Cal.) at page 1198 and following. In order to establish a prima facie case under the "rule of exclusion" it must be established that the excluded group must also constitute a substantial segment of the population. *Norris* v. *Alabama*, (1935) 294 U.S. 587; *Hernandez* v. *Texas*, (1954) 347 U.S. 475, at 480.

Pursuant to Rule 7(a) of the rules governing Section 2254 cases, the District Court Judge has the power to expand the record to include additional materials which would be relevant to the Court in determining the merits. It is Rule 7(b) which controls the degree to which a record may be expanded and includes, *without limitation* letters pre-dating the filing of the petition in the District Court, documents, exhibits, answers under oath propounded by the Court, and affidavits may be submitted and considered as part of the record. See *Turner* v. *Chavez*, 586 F.2d 111, 113 (9th Cir. 1978).

The Advisory Committee, in its notes, discusses the rationale for the expanded record. It could eliminate the

petition; it could establish the requirement for an evidentiary hearing and it could eliminate unnecessary hearings.

After the State had made a motion to dismiss the original petition pursuant to Rule 9 based on the premise that an expansion of the record could not have been reasonably anticipated, Chief Judge Karlton responded in *Hillery* v. *Sumner*, 496 F. Supp. 632, 635 (1980) as follows:

> "Essentially, respondent's argument is one of 'surprise.' . . . Such an argument cannot prevail, for there could be no surprise. The power of inquiry on federal habeas corpus is plenary. *Townsend* v. *Sain*, (1963) 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed. 2d 770. Although the state court records are generally all that is before the court at the time the return is filed (see Rule 6(b)), the court's consideration of the alleged constitutional violation is not confined to the state court record; the court's power to take evidence relevant to an allegedly unconstitutional detention has been repeatedly upheld. Id. at 311, 83 S.Ct. at 756; *U.S. ex rel. Barksdale* v. *Blackburn*, (5th Cir. 1980) 610 F.2d 253, 259. If, as petitioner alleges, he did not receive a full and fair evidentiary hearing in the state court, a hearing in this court is mandated (Id. at 312; 28 U.S.C. Section 2254(d); moreover, in other cases it is within the court's discretion to take evidence bearing upon the applicant's claim. *Townsend* v. *Sain*, *supra*, 372 U.S. at 318, 83 S.Ct. at 759."

Once the Court has determined that expansion of the record would be of value in deciding whether to go forward or not, and sets forth the items requested, copies of all documentation are to be submitted to the party against whom they are offered. See Rule 7(c) of the rules. Rule 7(c) further states that the option available to the party against whom these documents are offered is the opportunity to *admit or deny their correctness*. The State of

California did not exercise either of these options but merely objected to the entire proceeding and attempted to restrict the Court to the bare record of the State courts.

If Rule 7 is to have any meaning at all, then the District Court cannot be bound only by the information found in the State Court record. It must have the power to expand the record so long as no *new claims* are presented and the "new evidence" does not work a *fundamental change upon the claim*. *Nelson* v. *Moore*, 470 F.2d at 1197, cert. denied, 412 U.S. 951; *Domaingue* v. *Butterworth*, 641 F.2d 8, 12 (1st Cir. 1981); *Daniels* v. *Nelson*, 453 F.2d 340, 342 (9th Cir. 1972); *Schiers* v. *California*, 333 F.2d at 175; *Hall* v. *Sumner*, 512 F. Supp. 1014, 1017 (N.D. Cal 1981). Hillery must have presented to the State Court essentially the same *claim* as that presented to the District Court. *Picard* v. *Conner*, *supra*.

In the "expanded record," the State did not admit or deny the accuracy or validity of the data presented in accordance with Rule 7(c). Rather, it objected to introduction of any of the evidence on the basis that the material presented "new facts" which substantially transformed Petitioner's claim from that presented to the State Court. The *claim* presented to the State Court is identical to the claim presented to the District Court and has *never* changed, i.e. systematic exclusion of Blacks from the grand jury process. That claim began before Hillery's trial was commenced and has never changed. All the expanded record did was to provide a convenient analysis of the census data to assist the District Court in determining the merits of the claim which Respondent asserts is the real purpose for the existence of Rule 7. In fact, Chief Judge Karlton expressed some dismay over the fact that the State did nothing to assist the Court in determining the

merits of the claim. Rather, the State adopted an obstructionist attitude. See *Hillery* v. *Pulley*, 563 F. Supp. 1228 (1983), footnote 7, where the Court states:

> ". . . The figures used by Petitioner's attorney and the method employed, as well as the calculations themselves, are not dependent on the credibility of the witness, and are subject to direct verification or impeachment by the State. They stand unrefuted in the record."

Footnote 16 of the same opinion states:

> "Respondent's failure to present expert statistical analysis is baffling. Earlier in this proceedings, Respondent stated in an answer to an interrogatory that a statistical expert was in the process of being retained."

The District Court had before it all of the evidence presented to the California Courts. With that in mind, what change did the use of the computer analysis and the testimony of the witnesses work on the evidence already before the District Court? Chief Judge Karlton examined the problem in *Hillery* v. *Pulley*, 533 F.Supp. 1189 *supra*, and held as to the mathematical calculation that:

> "Thus, the statistical analysis of census data is not in and of itself dispositive of the legal issue before the court. Therefore, to the extent that respondent argues that such evidence works a fundamental change upon petitioners claim because it is of a dispositive nature, the state is incorrect. More importantly, however, is the fact that respondents arguments misconstrue the nature of the evidence in question. The testimony proferred by petitioner is simply an expert analysis already before the court and is not, in this sense, "new evidence." In this regard it seems relatively clear that the statistical analysis of census data is the kind of information designed to make the facts relative to the absence of

> blacks on grand juries significant, i.e. to aid the trier of fact in understanding the evidence before the court. . . . The statistical analysis of census data is, therefore, an interpretive aid for use by the court rather than 'new evidence' as it is characterized by respondent. It is precisely this type of analysis which must be considered by the Federal Court in performing its duty of independently applying Federal law to the facts as found by the state court. Accordingly the court holds that the introduction of the analysis of census data does not so fundamentally change the character of petitioners claims that he must return to the state courts." *Hillery* v. *Pulley, supra*, 1202 and 1203.

See also *Alexander* v. *Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed. 2d 536 (1972) and *Castaneda* v. *Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed. 498, (1977) where the Court used statistical analysis in determining whether systematic discrimination existed.

The data presented to the District Court in response to the direction of that Court merely expanded the understanding of the data which had been previously pesented to the State Courts.

In response to the State's objection, the District Court addressed itself to the use of the witness testimony in the District Court relative to the competence of blacks to serve as grand jurors and concluded that this testimony was merely *cumulative* to the testimony and evidence which had been presented to the California Courts by different witnesses on the same subject reaching the same conclusion; that there were Blacks eligible for grand jury service for the times in question and that none were selected. *Hillery* v. *Pulley, supra*, page 1202.

If this Court were to restrict Rule 7 to a review of the material presented to the State Courts without the right

to look at that same data from a different perspective, thus denying to the District Court the right to expand the record in accordance with prior Supreme Court decisions, then the "expansion doctrine" of Rule 7 would cease to exist.

III

THE DISTRICT COURT PROPERLY APPLIED THE *PER SE* RULE OF REVERSIBLE ERROR ONCE THE STATE FAILED TO REBUT RESPONDENT'S PRIMA FACIE CASE OF DISCRIMINATION IN THE GRAND JURY SELECTION PROCESS

Respondent submits that Hillery has fully exhausted his State remedies; has proven that discrimination in the selection of the grand jury existed; and, therefore, the issue of the application of the "per se rule" of reversible error versus the "harmless error" doctrine is now properly before this Court.

In simple terms, the State is asking this Court to overturn approximately 100 years of case law relative to proved discrimination in the grand jury selection process.

> "For nearly a century, this Court in an unbroken line of cases has held that 'a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment from which Negroes were excluded by reason of their race.'" *Rose* v. *Mitchell*, 443 U.S. 545 (1979).

In *Rose* v. *Mitchell*, *supra*, if the Court had found that discrimination in the selection of the Grand Jury had occurred it would have overturned the conviction. Failure of the claimants to establish a case of discrimination resulted in the Court denying the relief sought.

Respondent does not present the problem presented to the *Rose* Court because Respondents claim of discrimination was established and *not rebutted*. It is proven and therefore, the claim of discrimination is not before this Court for determination. Once the prima facie case of discrimination was established by Respondent and not rebutted by the State, the District Court had no choice but to follow the dictates of the long line of Supreme Court cases and set the conviction aside.

If the Court holds that the error in this case is "harmless," it is Respondent's position that the Court will have removed a fundamental due process and equal protection right as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner attempts to develop arguments which emanate from Justice Jackson's dissent in *Cassell* v. *Texas*, 339 U.S. 282 (1950) and Judge Friendly's Law Review Article in 38 U. Chi. L. Rev. 142, both of which discuss the development of the "Harmless Error" doctrine in those cases where there was proved discrimination in the Grand Jury process followed by a proper conviction on the merits. This Court in *Rose*, *supra*, analyzed and discussed those same arguments and Justice Blackmun, in rendering the opinion of the Court, found that there was a fundamental difference between discrimination in the selection of the grand jury and the Fourth Amendment exclusionary rule. Therefore, the Court concluded, in substance, that a personal constitutional right cannot be viewed in the same light as a judicially created remedy.

Petitioner cites *Hobby* v. *United States*, 468 U.S. ____, 104 S.Ct. 3093, 82 L.Ed. 2d 260 (1984), that there need not be an automatic reversal of the conviction where there was discrimination in the selection of a Federal Grand Jury foreman. *Hobby*, *supra*, was a Federal problem as opposed to a State problem. The selection of the foreman in *Hobby* was made by the Grand Jury members them-

selves and not by a Judge. Therefore, as Chief Justice Burger stated;

> "Under the federal system, by contrast, the foreman is chosen from among the members of the grand jury after they have been empaneled, see Fed. Rule Crim. Proc. 6(c); the federal foreman, unlike the foreman in *Rose*, cannot be viewed as the surrogate of the judge. So long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process." *Hobby* v. *U.S.*, *supra.*

Chief Justice Burger further emphasized the distinction between the selection of the grand jury foreman and the selection of the grand jury itself when he stated:

> "Discrimination in the selection of the grand jury foremen—as distinguished from discrimination in the selection of the grand jury itself—does not in any sense threaten the interest of the defendant protected by the Due Process Clause. Unlike the grand jury itself, the office of the grand jury foreman is not a creature of the Constitution; instead, the post of foreman was originally instituted by statute for the convenience of the court." *Hobby* v. *U.S.*, *supra.*

Respondent contends that the messages of the cases is quite clear. Where a court itself acts in a discriminatory manner in the selection of the grand jury, an indictment handed down by that grand jury against a member of the class discriminated against is judicially tainted. Further, the integrity of the judicial process is so impugned that any conviction obtained as a result of that indictment must be overturned because the error is "per se" reversible.

In short, Petitioner would have this Court ignore the Constitution in the present case, hold that the "Harmless

Error Doctrine" be extended to this type of claim, and reverse the District Court's granting of Respondent's application for a writ of habeas corpus. In Respondent's view, the District Court properly ruled in granting the writ of habeas corpus and for this Court to reverse the District Court's decision would work an incredible injustice not only on Respondent, but on our Constitutional system as a whole. See *Chessman* v. *Teets*, 354 U.S. 156, 165 (1957).

CONCLUSION

It is respectfully requested that this Court affirm the decisions of the United States District Court for the Eastern District of California, and the United States Court of Appeals for the Ninth Circuit in granting the Petition for Writ of Habeas Corpus under Title 28 U.S.C. Section 2254.

Respectfully submitted,

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MOTION FILED
JUL 18 1985

No. 84-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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No. 84-836

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

MOTION OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The NAACP Legal Defense & Educational Fund, Inc., ("LDF") respectfully moves the Court pursuant to Rule 36.3, Rules of the Supreme Court of the United States, for leave to file the attached brief as amicus

curiae in support of respondent. Respondent has consented, but the State of California has refused its consent.

LDF is a non-profit corporation organized under the laws of the State of New York. It was formed to assist blacks to secure their constitutional rights through the courts. Under its charter, LDF renders legal aid to impoverished blacks suffering injustice by reason of race. For many years, its attorneys have represented parties and appeared as amicus curiae in this Court on a broad range of issues including both the substantive and procedural law relevant to cases of racial discrimination.

This case involves questions regarding appropriate remedies for racial discrimination in the selection of grand juries. Issues of racial discrimination in jury selection have been a long standing concern of LDF; it has represented criminal defendants raising jury discrimi-

nation claims on direct appeal, e.g., Alexander v. Louisiana, 405 U.S. 625 (1972); Swain v. Alabama, 380 U.S. 202 (1965); represented potential black jurors who have been excluded from jury service, e.g., Turner v. Fouche, 396 U.S. 346 (1970); and is participating in this Court as amicus curiae in pending cases raising important issues of jury discrimination. E.g., Batson v. Kentucky, No. 84-6263.

This case presents the important question of the remedy for grand jury discrimination and a complicated issue of habeas corpus jurisprudence. In light of LDF's historic concern with and involvement in jury issues, and in light of LDF's recognized expertise in "the difficult questions of law that frequently arise in" these case, see NAACP v. Button, 371 U.S. 415, 422 (1963), we respecfully submit that its participation will be of assistance to the Court.

For the foregoing reasons, we respectfully request that leave to participate as amicus curiae be granted.

Respectfully submitted,

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STATEMENT OF THE CASE

A. Statement of Facts: Grand Jury Discrimination

The district court found that respondent, Booker T. Hillery, was indicted for murder in 1962 by a Kings County, California, grand jury from which all eligible blacks were excluded in violation of the equal protection clause. Hillery v. Pulley, 563 F.Supp. 1228 (E.D. Cal. 1983).[1]

The basic historical facts were never in dispute. Potential grand jurors were selected by the superior court judge from the list of eligible jurors in the county. Kings County had only one superior court

[1] Mr. Hillery, a black, was also tried and convicted for the murder of a white by a petit jury that was all white. All claims of exclusion of blacks from Mr. Hillery's trial jury were dismissed by the first habeas judge as "conclusionary and unsupported." See n. 12 infra. Thus, the issue was not explicated at the habeas hearing. Nevertheless, it appears that at Mr. Hillery's trial, the prosecution exercised its peremptory challenges to strike all blacks from the venire. Hilley v. Pulley, No. 83-2017 (9th Cir.) Clerk's Record Doc. No. ("C.R.") 5 at 11.

judge. At the time of Mr. Hillery's indictment and trial, this judge was Meredith Wingrove, who had served since 1956. By his own admission, R.T. 102,[2] he never selected a black to serve on a grand jury until 1963, the year after Mr. Hillery's challenge to the composition of the grand jury and trial. That first black grand juror, Ann B. Cole, was -- as both the California Supreme Court, J.A. 48, and the habeas court, 563 F. Supp. at 1232 & n. 8, found -- the first black ever to sit as a grand juror in Kings County since its incorporation in 1893.

While the black population of Kings County was small, there were sufficient eligible blacks to have appeared on grand juries in the absence of discrimination. Although blacks constituted only about 1% of the county prior to World War II, post

[2] Citations to the 1962 state court hearing are designated "R.T." Citations to the record in the Ninth Circuit are designated "C.R." Citations to "J.A." refer to the Joint Appendix in this Court.

war migration brought increasing numbers of blacks. Blacks constituted 3.9% of the county by 1950 and 5.1% by 1960. J.A. 44-45. Blacks served as trial jurors throughout this period even though, as later developed at the habeas hearing, the number of blacks over twenty-one years old, the minimum age for jury duty at that time, was slightly below the overall percentage of blacks in the county: about 3.8% in 1950 and 4.7% in 1960. 563 F.Supp. at 1232; J.A. 61.

In 1962, California law governing eligibility for grand jury service required that the potential juror be "of fair character, approved integrity, and sound judgment." 563 F.Supp at 1231 & n. 3. The records of both the state court and the habeas hearing make clear that in 1962 there were blacks in Kings County who met these criteria. Judge Wingrove mentioned Mr. Lloyd Welcher, who, he had determined, was qualified to serve. Judge

Wingrove nevertheless declined to submit his name for the dubious reason that he was employed.[3] It was also established that blacks had served on petit juries, J.A. 48, the qualifications for which were essentially similar. 563 F.Supp. at 1245.[4]

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[3] As Judge Wingrove put it, "you can't expect to put somebody on the Grand Jury who is going to have to interfere with his employment too much." 563 F.Supp. at 1233; J.A. 50.

The reliance on the fact of employment to disqualify an otherwise eligible black is dubious in light of Judge Wingrove's statements that he looked for potential jurors "of the better type" and his efforts "to get occupations, farmer, businessmen and other various types so it will be real — a real representative group of people, of the better type." R.T. at 38. If Mr. Welcher had been unemployed would not that have suggested to Judge Wingrove that he was not "of the better type?"

It should also be noted that the habeas court found "that grand jury service would have been a hardship but that some blacks, if asked to serve, would have made the sacrifice." 563 F.Supp. at 1234.

[4] Indeed, when Judge Wingrove finally began seriously to consider blacks for grand jury service for 1963, he turned to Bessie Welcher, a black resident of the county, who had previously served on Kings County trial juries in the 50's and early 60's. He did not select Mrs. Welcher in 1963 because she had served as a trial juror in 1962; under the statute, jury service in the immediately preceding year was a disqualification. Deposition of Bessie Welcher at 11-12, C.R. 52. See discussion infra.

At the habeas hearing, Mr. Hillery submitted the testimony of elderly black residents of Kings County and that of Mr. Hillery's original trial counsel, Hugh Goodwin, to corroborate that there were qualified blacks eligible for grand jury service in 1962. The habeas court specifically credited this testimony.[5] Together with the evidence in the state court record, it established that "there were in Kings County in the 1950's blacks

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[5] The habeas court particularly relied on Mr. Goodwin's testimony, 563 F.Supp. at 1233, which it explicitly characterized as "credible." Id. at 1246.

Both in the petition for certiorari, at 16-17, and in its brief on the merits, at 41-42, the state sets forth the the substance of its cross-examination of these elderly black witnesses concerning the qualifications for grand juror in an attempt to suggest to the Court the unreliability of this testimony. But the federal district court that heard this cross-examination, saw these witnesses, and observed their demeanor was in the best position to weigh the reliability of their testimony and the success of the attempted impeachment. Not only did the district court specifically note the credibility of Mr. Goodwin, it also "note[d] that the only thing more disturbing than the State's failure to introduce expert statistical analysis was respondent's counsel's pointless honing of his cross-examination skills on the elderly black citizens of Kings County...." 563 F.Supp. at 1242 n. 16.

eligible for grand jury service, even given the limited literacy and education level that prevailed among the black population at the time...." 563 F.Supp. at 1234, 1232-33, & 1245-46.

Why these eligible blacks surfaced on the county's petit juries but not its grand juries is made clear on the face of the state court record. For Judge Wingrove explained how he chose potential grand jurors. Applying the openly subjective statutory criteria, he looked for "the better type of our citizens," 563 F.Supp. at 1232; R.T. 37, "someone who has some substance, ... someone who, in the Court's opinion, is intellgent...." Id.; R.T. 104. Thus, while Judge Wingrove asserted that he tried to get a "distribution of racial descents ... both sexes ... occupations, farmer, business men and various other types...," id.; R.T. 38, this was qualified by his desire to obtain "a real representative group of people, of

the better type." Id. (emphasis added). As a result, Judge Wingrove openly acknowledged that he

> never had a colored person on the panel not through lack of desire, but purely through lack of ability to find one that the Court feels would make a proper Grand Juror.

563 F.Supp. at 1233; R.T. 38.[6]

These statements are a candid admission of discrimination under the then governing law. "In explaining the fact that no Negroes appeared on this grand jury list, the [judge] said that [he] knew none available who qualified...." Cassel v. Texas, 339 U.S. 282, 287 (1950). Yet, he also failed in his "constitutional duty" to "seek to learn whether there are in fact any qualified to serve...," Hill v. Texas, 316 U.S. 400, 404 (1942), and "to familiarize [himself] fairly with the

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6 Judge Wingrove even touted his racial evenhandedness in classic terms, R.T. 39: "My goodness, ... for three or four years I palled [sic] around with a colored boy and I will certainly be happy to name the gentleman Gene Roberts, his father worked for my father. I have many friends who are colored people." R.T. 40-41.

qualifications of the eligible jurors of the county without regard to race and color." Cassel, 339 U.S. at 289. For, as the district court found,

> given the most generous reading of the judge's description of his efforts to fulfill his duty under Hill, Cassel, and Smith [v. Texas, 311 U.S. 128 (1940)], it did not amount to much.

563 F.Supp. at 1248 n. 28.[7]

Judge Wingrove was far more successful in finding eligible blacks after Mr. Hillery's July 1962 challenge to the composition of the grand jury. In late 1962 or early 1963, Judge Wingrove contacted Mrs. Bessie Welcher concerning service on the 1963 grand jury. Because

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[7] Judge Wingrove made clear his view that, as far as any duty to include blacks on the grand jury, "the law certainly doesn't require such a thing." R.T. 59, 37. Indeed, he expressed his view that the Court's jury discrimination cases applied to the South, not California. R.T. 59-60; see n. 20 infra.

Judge Wingrove asserted that he had obtained some names of eligible blacks from Mr. Hillery's trial counsel, Hugh Goodwin, earlier that year (1962). It was not made clear whether that was for the 1962 or 1963 grand jury. Mr. Goodwin denied any independent recollection of that exchange. R.T. 42-43.

she had been as a trial juror in 1962, she was disqualified by statute from grand jury service in the immediately following year. The judge then asked her to provide the names of three qualified blacks, which she did. This led to the ultimate selection of Ann B. Cole as the first black grand juror ever to sit in Kings County. See C.R. 52, Deposition of Bessie Welcher at 11-12.

Finally, the finding of discrimination was premised on statistical analyses of the historical data. At the request of the federal district court judge, Mr. Hillery produced expert testimony that, even given the low number of eligible blacks in Kings County, the probability that the total absence of blacks on the grand juries between 1900 and 1962 was due to chance was 57 in 100,000 milion. The expert also testified that if only the years of Judge Wingrove's tenure were considered, the probability that no

blacks would have been chosen to serve on the grand jury if only random factors had governed was two-tenths of one percent, or two in a thousand. 563 F.Supp. at 1241; J.A. 67.

Although the habeas corpus court credited the expert's conclusion, 563 F.Supp at 1243, 1245, it did not do so by rote. Rather, because of the state's "baffling" failure to call a statistical expert of its own, 536 F.Supp. at 1242 n. 16, and because of its failure to rebut the statistical showing "through other evidence, cross-examination, or argument...," id. at 1242, the habeas court undertook its own statistical analysis. Limiting itself to the years of Judge Wingrove's tenure,[8] the district court

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8 The expert had looked at the course of grand jury selection in Kings County since the turn of the century. The court, on the other hand, postulated that the selection process over these years might, in reality, be a discontinuous series because of the change in the identity of the selector with the ascension of each new superior court judge. The court employed "a homey illustration...," 563 F.Supp. at 1242, to make its point: the use of repeated statis-

applied the standard deviation analysis used by this Court in Castaneda v. Partida, 430 U.S. 482, 496 n. 17 (1977). It calculated that the difference between the expected number of blacks (9.66) and the actual number (0) was "just over three standard deviations." 563 F.Supp. at 1244 & n. 23. It noted that the figure would be even larger if the entire course of conduct from 1900 onward were considered. Id. at 1245.[9] Thus, the district court,

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tical sampling of a deck of cards in order to ascertain whether the 8 of diamonds has been palmed by the dealer is valid only if there has been one dealer. "If, however, during the course of the game in question, a different dealer was substituted now and again, the probability that the final dealer palmed the card cannot be calculated from the fact that it is probable that there is no 8 of diamonds in the deck." Id. at 1243. Because of the failure of the state to produce any rebuttal statistical analysis, the court could not conclude from the record whether the 1900 to 1962 period was a continuous or discontinuous series. Id. Accordingly, it adopted the more conservative assumption that it was discontinuous.

9 Of course, even the district court acknowledged that the entire period from 1900 should be considered because the continuous series analysis was probably correct. Id. at 1243 & n. 18. Continuing with its 8 of diamonds metaphor, it recognized that, if the deck also changed with each new dealer, and "the experiment is conducted after each new dealer and the probabilities after each such experiment is [sic]

even after exercising caution, finds that standard deviation analysis supports [the expert]'s conclusions and, under the "rule of exclusion," indicates that "racial or other class-related factors entered into the selection process."

563 F.Supp. at 1245 (quoting Castaneda, 430 U.S. at 494 n. 13).

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that there is no 8 of diamonds in the deck, then we have powerful evidence concerning the house's policy on cheating." Id. at 1243 n. 18. Transposing the metaphor to the problem at hand, it is clear that in each year there was a pool of eligible grand jurors containing some blacks -- i.e., a deck containing an 8 of diamonds -- and in each year from 1900 to 1962 no blacks ever surfaced on the grand jury no matter which superior judge --i.e., which dealer -- was sitting. Accordingly, the inference of discrimination is "powerful."

Moreover, the historic record of total absence of blacks from Kings County grand juries is important for one further reason. Amongst the circumstantial evidence to be considered in making the "sensitive inquiry" into discrimination is: "The historical background of the decision ..., particularly if it reveals a series of official actions taken for invidious purpose...."Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 257-59 (1977). Thus, even if the process of selecting grand jurors since the turn of the century is considered a discontinuous series, evidence of prior historical practice would be relevant (to use the district court's metaphor) to "the house's policy on cheating" — i.e., the policy and practice that had historic sanction when Judge Wingrove took over the selection of grand jurors in 1956.

B. Course of Proceedings

In an indictment returned on June 27, 1962, an all white grand jury indicted Mr. Hillery for murder. On July 16, 1962, he filed a motion to quash the indictment on the ground that blacks had been systematically excluded from Kings County grand juries. J.A. 19-20. A hearing was held on July 31, 1962, and the motion was denied the same day.[10]

The hearing was presided over by Judge Wingrove, the only superior court judge sitting in Kings County. All of Judge Wingrove's predecessors were deceased. Because Judge Wingrove had personally selected the grand jury that indicted Mr. Hillery, and the seven preceding grand juries as well, respondent asked Judge Wingrove to testify. The judge declined,

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[10] Judge Wingrove repeatedly obstructed Mr. Goodwin's attempt to prove the historical exclusion of blacks by calling the district attorneys who had practiced before the grand juries, characterizing it as "negative evidence" that would take too long. R.T. 31, 33, 42, 45, 46, 47, 53. He made clear that he would only give the hearing one day. R.T. 55.

R.T. 102, although there were state procedures allowing transfer to another judge that would have enabled him to do so. 563 F.Supp. at 1230-31 n. 1. Accordingly, he was not sworn as a witness nor subject to cross-examination. Judge Wingrove did, however, make several statements on the record; he ordered that these statements be considered his "testimony." R.T. 102.

The state introduced the census figures from 1910 onward. These showed that blacks constituted between .8% and 1.1% of the county population prior to World War II, 3.97% in 1950, and 5.1% in 1960. J.A. 45. Respondent's allegation that blacks had never served on the grand jury was not disputed; it was further supported by the testimony of the county sheriff, who had resided in the county since 1930, and a newspaperman, who had worked on the local paper since 1910. The county clerk testified that blacks had

served on trial juries since she had taken office in 1953. J.A. 32, 39. It was also established that, in the decade prior to Mr. Hillery's indictment, only four felony prosecutions were initiated by indictment, although there had been over 1,000 criminal[11] prosecutions during that period. There had been only one indictment in 1962, Hillery's. J.A. 32-33. In addition to Mr. Hillery, one other of the indicted defendants was black. J.A. 33. Both the prosecutor and the judge indicated that the primary function of the grand jury was to serve as a watchdog agency, supervising the county government. J.A. 33; R.T. 107.

Judge Wingrove made extensive comments on the record concerning both the motion to quash and his role in selecting the grand jury. His comments on the latter issue have been described above. With regard to the motion, he stated that "the

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11 It was not explained whether the 1,000 criminal prosecutions were all felony cases or whether they included misdemeanor cases.

Court resents any accusations of discrimination shown by this Court...," R.T. 65, and that "the Court very stoutly denies and refutes and feels somewhat incensed with the implication that there has been any discrimination...." R.T. 64 (similar statements appear at R.T. 36, 39). On the ultimate issue of discrimination, he asserted: "There certainly never has been, as far as the present Court is concerned ... any systematic exclusion of anybody from the Grand Jury because of any racial descent...," R.T. 39, and that "[a]s far as the present Court is concerned ... there has never been any feeling of discrimination of any kind ... against anyone...." R.T. 60 (similar denials appear at R.T. 40-41, 105).

Respondent was convicted of first degree murder and sentenced to death in November 1962. As set out in the state's brief, the evidence against Mr. Hillery was entirely circumstantial. Both the

conviction and the sentence of death were affirmed on appeal. People v. Hillery, ___ Cal. 2d ___, 34 Cal. Rptr. 853, 386 P. 2d 477 (1963). Rehearing was granted; the court affirmed the conviction, holding that the circumstantial evidence was sufficient to connect respondent to the crime, but reversed the sentence. People v. Hillery, 2 Cal. 2d 692, 44 Cal. Rptr. 30, 401 P.2d 382 (1965). In its second opinion, the California Supreme Court affirmed Judge Wingrove's ruling on the grand jury discrimination issue as amply supported by the record. In assessing that record, the California court emphasized Judge Wingrove's statements, devoting just over half of its summary of the factual record on the issue to those statements. J.A. 49-50. This Court denied certiorari, Hillery v. California, 386 U.S. 938, reh'g denied, 386 U.S. 1000 (1967), three Justices dissenting on the ground that the admission of evidence

concerning a prior conviction, relevant to the issue of sentence, at a non-bifurcated proceeding violated due process.

On remand, respondent was resentenced to death. This sentence was affirmed. 65 Cal.2d 795, 56 Cal.Rptr. 180, 423 P.2d 208 (1967), cert. denied, 389 U.S. 986, reh'g denied, 390 U.S. 913 (1968). Following this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), Mr. Hillery filed an original petion for habeas corpus in the California Supreme Court asking that court to recall its remittitur and judgment to consider whether a death-scrupled juror had improperly been excused for cause at the second penalty trial. The California Supreme Court found a Witherspoon violation and reversed the sentence of death. In re Hillery, 71 Cal.2d 857, 79 Cal.Rptr. 733, 457 P.2d 565 (1969).

A third jury imposed the death sentence. Mr. Hillery once again appeal-

ed, raising claims challenging both the sentence and the original, 1962 conviction. On March 12, 1974, the California Supreme Court affirmed the original conviction but once again reversed the sentence of death. People v. Hillery, 10 Cal.3rd 897, 112 Cal.Rptr. 524, 519 P.2d 572 (1974).

Proceeding pro se, respondent Hillery then filed a petition for a writ of habeas corpus in state court raising the grand jury claim. The state trial court denied the petition on January 30, 1978. J.A. 4. The California Court of Appeal denied the petition on March 8, 1978. J.A. 5. On April 18, 1978, the California Supreme Court also denied the petition. Id.

Still proceeding pro se, Mr. Hillery filed a petition for a writ of habeas corpus in the federal district court for the Northern District of California on May 22, 1978. J.A. 5-6. It was transferred to the Eastern District and assigned to Judge

MacBride. Id. On January 31, 1979, Judge MacBride dismissed some claims[12] but, on the grand jury discrimination claim, found that Mr. Hillery had stated a prima facie case of discrimination, issued an order to show cause why the writ should not issue, and directed the state to file an answer. J.A. 69-76.

In its return to the petition, the state agreed that Mr. Hillery had exhausted his state remedies by raising the issue on direct appeal and in state habeas proceedings. It nevertheless claimed that federal habeas should be precluded because Mr. Hillery had "an opportunity for a full and fair litigation" of the claim and that the state court "record clearly demonstrates that there was no racial discrimi-

12 He dismissed a claim under the fourth amendment on the basis of Stone v. Powell, 428 U.S. 465(1976). The order also dismissed as "conclusionary and unsupported" additional claims challenging "the composition of his juries." J.A. 70 n. 1. See n. 1 supra. These were contained in a second pleading filed on July 26, 1978, that apparently never made its way into the record. See Clerk's Index of Proceeding (Docket Sheet) at 1.

nation in the selection of the grand jury." C.R. 4 at p. 2.

Subsequently, Judge MacBride took senior status and the case was transferred to the Hon. Lawrence K. Karlton. Judge Karlton reviewed the pleadings and the state court record. On March 27, 1980, he denied Mr. Hillery's motion for bail; granted the motion to appoint counsel; vacated Judge MacBride's prior order; and, as provided by Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts, directed the parties to supplement the state court record. C.R. 8. Applying this Court's admonition that a claim of grand jury discrimination requires a "factual inquiry ... that takes into account all possible factors...," Alexander v. Louisiana, 405 U.S. 625, 630 (1972), Judge Karlton concluded that "[t]o accomplish this, it is necessary to supplement and clarify the state court record which is silent or

unclear as to a number of relevant issues." C.R. 8 at p. 2.

Judge Karlton first directed the state to provide "more figures ... demonstrating what portion of the Black population of Kings County was eligible for grand jury service." Id. at 3 (citing Castaneda, 430 U.S. at 488-89 n. 8). Pursuant to Rule 7(b) he also propounded interrogatories "designed to clarify the state court record and the issues in this case...," C.R. 8 at 4, by fleshing out various factual questions not here relevant. Id. at 8.

Judge Karlton observed that the state court record "contains no information as to the results obtainable through the application of statistical analysis to the facts of this case." Id. at 3. Because he understood Castaneda, 430 U.S. at 494 n. 13, and Hernandez v. Texas, 347 U.S. 475, 482 (1954), to "focus[] on the likelihood that chance or accident alone

could account for the exclusion of a group from grand jury service...," C.R. 8 at p. 3, Judge Karlton concluded "that the application of statistical probability analysis may be of substantial assistance...," id. at 3-4, and directed the parties to respond with their views on both the appropriateness of such analysis and how it should be presented.

The state responded with a motion to dismiss premised on two grounds. C.R. 16. First, it invoked Rule 9 and argued that it was prejudiced in its ability to respond to the petition because Judge Wingrove had died in 1966. Second, it argued that this Court's decision in Rose v. Mitchell, 443 U.S. 545 (1979), "precludes supplementation of the state court record...." C.R. 16 at p. 7. This latter argument was premised not on any aspect of the exhaustion requirement, but rather on language in Rose that referred to the habeas petitioners' evidentiary showing,

which had been introduced in the state courts, and concluded: "On the record of this case, it is that testimony alone upon which respondents' allegations of discrimination must stand or fall." 443 U.S. at 570. C.R. 16 at pp. 9-11. From this observation, the state abstracted a general principle that a habeas court "is limited to the record presented to the state trial court under the clear authority of Rose v. Mitchell...." C.R. at p. 11.

Judge Karlton rejected both these arguments. Hillery v. Sumner, 496 F.Supp. 632 (E.D. Cal. 1980). The Rule 9 claim was rejected on alternative procedural grounds, id. at 635-36, and one dispositive substantive ground: Judge Karlton posited the best factual assumption for the state, "[a]ssuming, arguendo that the loss of Judge Wingrove's testimony would be sufficient prejudice to the state to support dismissal." Id. at 637. Reviewing

the "history of petitioner's state proceedings...," id., he concluded that, because of the principle of comity and the then governing Ninth Circuit precedents, the pending state proceedings meant that "at the earliest petitioner could not have filed in federal court until 1967..., and perhaps not even until 1974 when the state litigation was finally resolved." Id. [13] In either case, Judge Wingrove had already passed away before Mr. Hillery's claims were ripe for federal habeas and, thus, "no prejudice from delay suffered by the state is attributable to petitioner [Hillery]." Id. Although, Judge Karlton did not determine whether the loss of

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[13] Judge Karlton reasoned that it was not until 1967, when the California Supreme Court affirmed the second death sentence, that the state proceedings had ended and that all ofMr. Hillery's claims were ripe for presentation on federal habeas corpus. In fact, however, Mr. Hillery successfully reopened the state proceedings by filing an original habeas petition in the California Supreme Court raising a Witherspoon claim. That led to a new sentencing proceeding and a third direct appeal, on which the California Supreme Court rejected additional claims going to the 1962 conviction. Thus, in fact, the case was not ripe for federal habeas until 1974.

Judge Wingrove's live testimony was in fact prejudicial, it would seem clear that the judge's uncross-examined, 1962 comments were as favorable a record for the state as it was likely to have obtained had he lived.

Judge Karlton also rejected the state's contention that the habeas proceeding was limited to the state court record under Rose. He noted that "the single sentence in Rose that the trial judge's affidavit 'formed no part of the case put on by respondents' ... seems a slender reed to base such a startling departure from Rule 7(c), 28 U.S.C. § 2254(d), and Townsend v. Sain[, 372 U.S. 293 (1963)]." Id. Rather, he correctly explained the Rose opinion as concerning "the procedural posture of the case," --i.e., the fact that the Sixth Circuit premised "its finding of a prima facie case" on matters first introduced on

rebuttal in the habeas proceeding. 496 F.Supp. at 638 (emphasis in original).

After the parties responded to the court's interrogatories, the court held a status conference. At that time, the parties agreed: (1) that Mr. Hillery's evidence was sufficient to support an order to show cause why the writ should not issue; (2) that an evidentiary hearing was necessary, in part to enable the state to cross-examine Mr. Hillery's witnesses; and (3) that the state continued to maintain that "evidence outside the record should not be allowed" and preserved "this issue for appeal purposes." C.R. 32 at p. 1.

Despite the stipulation, the state filed a motion to dismiss and, shortly thereafter, a motion to deny Mr. Hillery's request for an evidentiary hearing. It was in these motions that the state first raised an exhaustion question with regard to the "new" evidence. Although Judge

Karlton was "somewhat frustrated" by the state's "notion that it may file a motion to dismiss in a habeas corpus proceeding whenever the spirit moves it to do so...," Hillery v. Pulley, 533 F.Supp. 1189, 1193 & n. 5 (E.D. Cal. 1982), he nevertheless entertained the motion on the merits.[14]

On the exhaustion issue, Judge Karlton started from the premise that "it is clear that the petitioner must have presented to the state court essentially the same claim as that presented to the district court." Id. at 1197. "It is equally clear...," he observed, "that a habeas petitioner is not limited to the record made in state court but that evidence can and, in some cases, must be

[14] Ordinarily, the exhaustion question is raised either in the state's answer under Rule 5 or by way of a motion to dismiss in lieu of an answer after the habeas judge has determined under Rule 4 that summary dismissal is inappropriate. In agreeing to the stipulation, "the state admitted that summary disposition was inappropriate." 533 F.Supp. at 1194. Plainly, the state could have and should have raised the exhaustion issue prior to stipulating that the case could not be dismissed summarily but should instead go to an evidentiary hearing.

taken." Id. Noting that "[n]either the cases, the federal statutes, nor the rules 'strip the district courts of all discretion to exercise their common sense...,'" id. at 1199 n. 19 (quoting Machibroda v. United States, 368 U.S. 487, 495 (1962)), he concluded that "it defies logic to assert that one likely result of granting an evidentiary hearing -- namely that the district court will receive evidence not presented to the state court -- requires dismissal for failure to exhaust." Id. at 1199 (emphasis added).

Judge Karlton identified the three items that the state objected to as "new" evidence: (1) the addition of census data for 1900; (2) the testimony of three witnesses called to establish the eligibility of blacks for grand jury service and other historical facts such as exclusion; and (3) the statistical analysis of the census data. 533 F.Supp. at 1200. On the basis of "[a] calm examination of the

evidence...," id. at 1201, he rejected the state's assertion that this "new" evidence "dramatically changes" the claim.

The first two items, Judge Karlton noted, were at best cumulative. The "new" evidence that blacks had never served on the grand jury did not alter the claim: That historical fact had been accepted by the state courts. The "new" evidence of eligible blacks was similarly cumulative because that fact was established by Judge Wingrove's statement that he declined to appoint an eligible black.

Judge Karlton also rejected the state's argument that the statistical analysis "fundamentally alters" the claim because it is "dispositive." Statistical analysis, he noted, is only one part of "a factual inquiry ... that takes into account all possible explanatory factors." 533 F.Supp. at 1202 (quoting Alexander, 405 U.S. at 630). "More important...," Judge Karlton continued,

> is the fact that respondent's arguments misconstrue the nature of the evidence in question. The testimony... is simply the expert analysis of evidence already before the court.... [S]tatistical analysis of census data is the kind of information designed to make the facts relative to the absence of Blacks in grand juries significant, i.e. to aid the trier of fact in understanding the evidence before the court.

533 F.Supp. at 1202. This conclusion was corroborated, Judge Karlton observed, by this Court's use of statistical analysis in Alexander and Castaneda even though such analysis was not part of the record in the courts below. Id. at 1203.

Judge Karlton found that Hillery's proffered evidence stated a prima facie case under Castaneda and ordered an evidentiary hearing. After the hearing, he found that blacks had been systematically excluded from Kings County grand juries. He rejected the state's argument that grand jury discrimination is harmless error both on the basis of Rose v. Mitchell and because of the need to deter

discrimination and maintain the integrity of the judicial process. 563 F.Supp. at 1252. Accordingly, he issued the writ. Id.

The Ninth Circuit affirmed, one judge dissenting on the exhaustion issue. Hillery v. Pulley, No. 83-2017 (9th Cir. May 14, 1984). In a per curiam opinion, it relied on "the reasons set forth is the excellent and extensive District Court opinion granting the application...," citing each of Judge Karlton's three published opinions. 563 F.Supp 1228; 533 F.Supp. 1189; and 496 F.Supp. 632.

SUMMARY OF ARGUMENT

For over 100 years, the Court has held that racial discrimination in the selection of the indicting grand jury requires reversal of the resulting conviction. This principle is supported by five important considerations. First, the very function of the grand jury is distorted when identifiable groups with distinct experiences and perspectives are

removed from the decision-making process. Second, claims of racial discrimination have a special constitutional force in light of the fundamental concern with racial equality that emerges from this country's history. Third, the taint of racial discrimination impugns the integrity and legitimacy of the administration of criminal justice. Fourth, as a practical matter, the remedy repeatedly affirmed by the Court is the only effective one.

Finally, the notion that a subsequent conviction renders a tainted indictment harmless misconceives the role of the grand jury. A grand jury not only decides whether a criminal case should go forward, it also decides how the prosecutor will proceed by determining the scope and severity of the crime charged. A harmless error analysis is inapplicable because a court cannot reconstruct how a properly constituted grand jury would have charged the defendant.

The version of the exhaustion requirement proposed by the state has no support in the habeas statute, the rules governing habeas proceedings, the precedents of the Court, or any identifiable policy of federalism. Once a habeas petitioner has fairly presented the legal and factual substance of his claim to the state courts, he cannot fairly be penalized for their failure either to afford him a full and fair hearing or to consider his claim in light of the governing constitutional principles. No considerations of federalism or sound judicial administration call for a rule that reduces the role of a federal habeas judge to a rubber stamp of the state process. Rather, the habeas scheme long embedded in statute and case law expects and requires federal judges to conduct an independent, constitutionally sensitive inquiry into allegations of constitutional error. See, e.g., Brown v. Allen, 344 U.S. 443, 507 (1954).

ARGUMENT

I. THE VERY NATURE OF THE CLAIM OF RACIAL DISCRIMINATION IN THE SELECTION OF THE GRAND JURY RENDERS A HARMLESS ERROR ANALYSIS INAPPROPRIATE

The state's case for overruling a century of precedent only rehashes points the Court has long, repeatedly, and recently rejected. See, e.g., Rose v. Mitchell, 443 U.S. 545 (1979).

> It has been settled law since 1880 that the Civil War Amendments barred the States from discriminating because of race in the selection of juries, whether grand or petty. As a result, a conviction cannot stand which is based on an indictment found by a grand jury from which Negroes were kept because of discrimination.... We ought not to reverse a course of decisions of long standing directed against racial discrimination in the administration of justice.

Cassell v. Texas, 339 U.S. 282, 290 (1950)(Frankfurter, J., concurring)(citing Neal v. Delaware, 103 U.S. 370 (1881)). The doctrine of stare decisis carries added weight in the context of the fundamental national norm prohibiting racial discrimination. See Runyon v.

McCrary, 427 U.S. 160, 191 (1976)(Stevens, J., concurring).

Five important considerations sustain the time honored rule that grand jury discrimination fatally undermines the validity of the indictment and the resulting conviction: First, the exclusion of an identifiable segment of the community from the the grand jury undermines its function by

> remov[ing] from the jury room qualities of human nature and varieties of human experience the range of which is unknown and perhaps unknowable.

Peters v. Kiff, 407 U.S. 493, 503 (1972). This range of perspective is as critical when the jury in employed at the charging stage as it is at trial. In noting the constitutional immateriality of the ministerial position of grand jury foremen in Hobby v. United States, 468 U.S. ___, 82 L.Ed.2d 260 (1984), the Court affirmed by necessary implication that the grand jury itself is so significant to the

> administration of justice that discrimination in [its] appointment ... impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment.

Id., 82 L.Ed.2d at 266.[15]

Second, the fundamental norm prohibiting racial discrimination has special constitutional force.

> [T]here can no longer be any doubt that racial discrimination ... violates deeply and widely accepted views of elementary justice.... Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination.

Bob Jones University v. United States, ___ U.S. ___, 76 L.Ed.2d 157, 174 (1983). That racial discrimination in grand jury selection offends this firm national policy has been emphasized both by this Court's decisions, see Rose, and by congressional enactment specifically

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15 See also id. at 267 (no constitutional error "[s]o long as the composition of the grand jury as a whole serves the representational due process value...").

making such discrimination a criminal offense. 18 U.S.C. § 243; see Alexander, 405 U.S. at 629 n. 8.

Third, "the jury plays a political function in the administration of the law...." Taylor v. Louisiana, 419 U.S. 522, 529 (1975). The specter of racial discrimination in the criminal justice system -- particularly where the key actor is the judge himself -- is "not ... consistent with our democratic heritage" nor conducive "to public confidence in the fairness of the criminal justice system." Id. at 530. It

> destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process..., impair[ing] the confidence of the public in the administration of justice.

Rose, 443 U.S. at 555-56.[16]

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[16] Justice Stevens has expressed much the same idea: "A rule that forbids discrimination in the selection of a grand jury must be justified by the overriding interest in maintaining the integrity of the judicial process -- both the actual fairness of that process and the symbolic values that it embodies." Hobby, 82 L.Ed.2d at 277.

The fact that California grand juries only rarely serve the charging function, but ordinarily serve as "watchdog" over county government, reenforces rather than diminishes these concerns. Nothing could be more central to democratic notions than the grand jury's role as overseer of the citizens' elected and appointed officials. The exclusion of blacks from this aspect of self-government is amongst "the primary evil[s] at which the Amendments adopted after the War Between the States ... were aimed." Rose, 443 U.S. at 554.

Moreover, the very rarity with which California prosecutors seek indictment by grand jury rather than proceeding by information underlines the importance of the grand jury's role. When a prosecutor can charge unilaterally, he is likely to seek indictment by grand jury only in those notorious or controversial cases where it is of heightened importance that the legitimacy of the criminal justice

process be supported by the the imprimatur of the community's judgment. But that increases the importance of assuring that no segment of the community is excluded from the grand jury.

Fourth, as the Court noted in Rose, reversal of convictions premised on indictments tainted by racial discrimination is the only effective mechanism for enforcement of these fundamental interests. Both criminal prosecutions and civil actions are rare, and costly. 443 U.S. at 558. An aggrieved defendant is well positioned to vindicate the underlying societal interest in deterring discrimination; the potential loss of otherwise supportable convictions is likely to be a powerful deterrent to the selector who, as here, is often an actor in the criminal justice system. In this very case, Mr. Hillery's motion to quash was the catalyst that ended more than half a century of

total exclusion of blacks from the grand juries in Kings County.

Finally, the harmless error rule is particularly difficult to apply in cases of grand jury discrimination. The argument that conviction beyond a reasonable doubt moots any taint at the charging level misconceives the function of the grand jury process.[17] For the grand jury is more than a simple binary gatekeeper deciding whether a particular defendant enters the criminal justice system. It also performs a discretionary role in shaping the processes to follow by the terms of the indictment it returns. If a grand jury indicts only for a lesser included offense, that is the greatest crime for which the defendant can be convicted regardless of the nature of the proof at

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17 It also misconceives the nature of the constitutional harm. If the constitutional injury is to the "symbolic values" of the criminal justice process, Hobby, 82 L.Ed.2d at 277, and the integrity and public legitimacy of that process, then the subsequent conviction does not undo the harm. The process still stands impugned.

trial. See Stirone v. United States , 361 U.S. 212 (1960)(cited in Miller v. United States, ___ U.S. ___, 85 L.Ed.2d 99, 107 (1985)). Similarly, if it charges a higher offense that includes lesser offenses, that will affect the decision facing the petit jury, increasing the reliability of the later determination of guilt or innocence. See Keeble v. United States, 412 U.S. 205 (1973); Beck v. Alabama, 447 U.S. 625 (1980).

These considerations reach their zenith in the notorious or controversial case. When the prosecutor seeks the imprimatur of the grand jury on the determinations of both whether and how to proceed, he is asking for the community's evaluation of the severity of the offense. Consider for example a recent case of some notoriety concerning allegations that a white shot four blacks youths in a New York subway. Two grand juries heard substantially similar testimony. One

charged the defendant with attempted murder, the other only charged him with gun possession violations. Suppose the difference between the two submissions was not in the quantum of the evidence but in the grand juries: one chosen from a representative cross-section, the other racially skewed. Plainly, the consequences of the actions of these hypothetical grand juries would not be erased by subsequent trial determinations in either case, and no amount of judicial hindsight could parse out those effects.

The facts of this case suggest similar problems. Hillery, a black man, was charged with and convicted of the murder of a young white woman, entirely on the basis of circumstantial evidence. The evidence also suggested an attempted rape. On this evidence, an all white grand jury in an overwhelmingly white county made him stand trial for his life. If there had been some blacks on his grand jury, might

they have considered the circumstantial nature of the evidence and charged only a lesser offense? Attempting a harmless error analysis in this context would place the courts in an inextricable speculative thicket.

II. THE EXHAUSTION DOCTRINE IS FULLY SATISFIED WHEN THE STATE COURTS HAVE CONSIDERED THE SAME QUESTION PRESENTED IN FEDERAL HABEAS

The basic fact of this case speaks starkly from the record and is not challenged by the state on certiorari before this Court. The California superior court judge who selected the grand jury that indicted Mr. Hillery -- and who also presided at his trial and decided the motion challenging the composition of the grand jury -- excluded blacks from service on the jury in violation of the equal protection clause.

The state nevertheless argues that the relief was wrongly granted because not every single piece of evidence supporting

this determination was "exhausted" in the state courts. It first wrongly asserts that exhaustion is a jurisdictional prerequisite. State's Brief at 71; but compare Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 691 (1984)("the exhaustion rule...is not jurisdictional"). Then, admitting the question is "a matter of degrees" that depends "upon the nature of the supplemental evidence...,"State's Brief at 74, it makes several alternative assertions concerning when "new" evidence must be "exhausted." These include: (1) "Where the new factual material 'wholly transforms' the case," id. at 81; (2) where it only "'materially changes' it," id.; (3) where it "puts the case in a markedly different posture," id. at 71-72; or, even, (4) "if the new factual allegations are simply more 'compelling.'" Id. at 81. It concedes that exhaustion is not required only when the "new" evidence

"does not materially affect the nature of petitioner's case...." Id. at 74.

The state's position has no basis in the statute, rules, or decisions of this Court concerning federal habeas corpus. Rather, it is transparently result oriented: Exhaustion would always be required unless the evidence makes no difference at all. This position denigrates the roles of the federal habeas judge and counsel, and diminishes the habeas remedy as Congress and the Court have long envisioned it.

In the sections that follow, we discuss the basic parameters of federal habeas corpus and the exhaustion requirement. From these, we derive a sensible and workable rule governing exhaustion that is consistent with both the system established by Congress and the Court and the considerations of comity and federalism.

A. The Federal Habeas Statute and the Exhaustion Requirement

It is helpful to start with the words of the statute. What must be "exhausted ... in the courts of the State" is "the question presented." 28 U.S.C. § 2254(c). "Question presented" is a term of art that has an established and accepted meaning. For example, under the rules of this Court, "[t]he statement of a question presented will be deemed to comprise every subsidiary question fairly included therein." Rule 21.1(a), Rules of the Supreme Court of the United States.

The essential requirement of §2254(b) & (c) is that the state prisoner provide the state courts with fair notice of each of his federal constitutional claims so that they have "the first opportunity to hear the claim...." Picard v. Connor, 404 U.S. 270, 276 (1971). This "notice and opportunity" requirement means that "the federal claim must be fairly

presented," id. at 275; but it is "the substance of a federal ... claim," id. at 278, that must be presented, not every fillip and curlicue.

> [T]here are instances in which "the ultimate question for disposition..." will be the same despite variations in the legal theory or factual allegations....

Picard, 404 U.S. at 277 (quoting Kemp v. Pate, 359 F.2d 749, 751 (7th Cir. 1966)).[18]

The cases substantiate that the exhaustion requirement is about fair notice and opportunity, not procedural exactitude. Thus, when the petitioner first presents the claim to the state court as a state law violation and later frames it in federal terms, the state courts have not had a fair opportunity to consider the question. Picard, supra;

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18 Of course, the defendant cannot knowingly withhold from the state courts relevant facts. But sandbagging of this type is avoided by the application of the "deliberate bypass" and "inexcusable neglect" standards. Townsend v. Sain, 372 U.S. 293, 317 (1963); Guice v. Fortenberry, 661 F.2d 496, 507 & n. 5 (5th Cir. 1981)(en banc); Thomas v. Zant, 697 F.2d 977, 984-85 (11th Cir. 1983).

Anderson v. Harless, 459 U.S. 4 (1982). Another example is a case in which the defendant claimed in state court that his counsel was ineffective in failing to make a particular objection. In federal habeas, he raised a claim of ineffective assistance premised on the entire course of representation. There, the state court was not fairly apprised of the claim and had no real opportunity to consider it. See Burns v. Estelle, 695 F.2d 847 (5th Cir. 1978).

On the other hand, Sanders v. United States, 373 U.S. 1, 16 (1963), provides a counter illustration. Sanders first challenged his confession as involuntary because of physical coercion. On collateral attack, he claimed psychological coercion as well. The Court held that only one claim was presented. The Sanders illustration -- affirmed for the exhaustion context in Picard, 404 U.S. at 277 --underlines the "fair notice and opportu-

nity" principle. Under the governing precedents, the original claim was one of involuntariness of the confession under the totality of the circumstances. See, e.g., Boulden v. Holman, 394 U.S. 478, 480 (1969). That put the first court on notice to consider and review all the circumstances, including those not specified by the defendant.

A similar example is a case in which a defendant first raised a claim premised on a course of conduct amounting to ineffective assistance of counsel. In his federal habeas petition, he specified different aspects of counsel's performance in support of his claim. There was no failure of exhaustion despite the pleading of "new" facts because the state court had fair notice and an opportunity to consider the claim. See, e.g., Vela v. Estelle, 708 F.2d 954, 957-60 (5th Cir. 1983).

Yet another example is provided by Townsend v. Sain, 372 U.S. 293 (1963). In

state court, the defendant claimed that his confession was involuntary because elicited while he was under the influence of a specified drug. In federal habeas, he sought to adduce that the drug was commonly known as a "truth serum." Certainly, this version of the evidence was, to use the state's term, "more compelling." But the Court did not send the case back to the state courts to exhaust the "new" evidence; it remanded, holding that a federal evidentiary hearing was required. Id.

Thus, the state's purported versions of the exhaustion requirement are not supported by the statute, the cases, or the doctrines of comity and federalism that inform them. What is required is only that the defendant have

> provided the [state] "court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.'"

Picard, 404 U.S. at 277. But this is

precisely what Mr. Hillery did.

The question presented to the state courts was identical to that presented to the habeas court. They were told that blacks had never served on the grand jury, that there was a postwar black population of 3.9 to 5.1%, that there were eligible blacks, and that the selection criteria were subjective. The claim was framed in federal constitutional terms. The state courts could have performed whatever statistical calculations appeared useful to them to assess these facts. They didn't. Judge Karlton decided that, in performing his responsibility as a habeas judge, he would be assisted by statistical analysis and specifically asked for it from both parties. Judge Wingrove, in contrast, saw his role differently: He didn't evaluate Mr. Hillery's evidence of racial discrimination, he tried to explain it away.

Analysis of the "new" evidence demonstrates that the exhaustion requirement was not circumvented. Neither the addition of one earlier set of census figures nor the proof of the historical facts of total exclusion and black eligibilty through different means altered the question presented. Nor did the so-called "sophisticated computer analysis," which was nothing more than a series of multiplications. See 563 F.Supp. at 1242 (petitioner's figures "obtained in a rather direct manner").

Statistical analysis is not "evidence;" it is a way of thinking about or evaluating evidence. Thus, in Alexander, the Court evaluated the raw figures in the record on the basis of a statistical analysis that was first set out in the petitioner's brief on the merits in this Court. 405 U.S. at 630 n. 9. Similarly, in Castaneda, a habeas case, the statistical analysis was first performed by the Court

itself. 430 U.S. at 496 n. 17. Statistical analysis is something the state courts, fairly apprised of the same issue, could have done for themselves if they chose. Their failure cannot be attributed to the habeas petitioner under the rubric of the exhaustion requirement.

B. Neither the Habeas Statute, the Rules, Nor the Decisions of this Court Contemplate that Each Piece of Evidence Would Have First Been Presented to the State Courts

One critical problem with the state's position is that it conflicts with the habeas scheme set up by statute, rules, and decisions of this Court. The converse of the principle that a state prisoner must provide the state courts with fair notice of the claim and an opportunity to consider it is that he is entitled to a full and fair opportunity to litigate that claim. When the state courts do not provide him a full and fair hearing, federal habeas is fully open: The state court findings are not presumed correct,

see 28 U.S.C. §2254(d), and a federal evidentiary hearing is mandatory. Townsend v. Sain.

In that case, it follows that the federal court will hear and consider evidence that was not presented to the state courts. That is what the hearing is for. If material facts were not adequately developed at the state hearing, then the presumption of correctness does not apply, § 2254(d)(3), and Townsend requires a hearing. The same is true if "the fact-finding procedure employed by the State court was not adequate...." Id., subsection (2).

The state trial hearing in this case was not full and fair because the judge who presided was an interested party who expressed on the record his resentment of the allegations. He was a material witness who effectively shielded himself from cross-examination and impeachment.[19] He

[19] Cf. 28 U.S.C. § 455(a) (disqualification of

both obstructed the defendant's attempt to prove his case, see n.10 supra, and misapplied the governing constitutional law.[20] The "findings" of the state supreme court were simply an affirmance of the flawed proceeding in the trial court. Indeed, the state supreme court accepted Judge Wingrove's "testimony" wholesale, even though exculpatory protestations of the discriminator are normally insufficient.[21] Faced with this, Judge Karlton properly undertook to reassess the facts and to hold a habeas hearing.

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federal judge when his or her "impartiality might reasonably be questioned"); id., subsection (b)(1) ("personal knowledge of disputed evidentiary facts").

20 Judge Wingrove expressed his view that the Court's jury discrimination cases "apply mostly to the southern part of the United States where there was established a pattern of white people in the minority" excluding blacks from all aspects of political life, a condition that "has never been true to my personal knowledge in the County of Kings or anywhere in the State of California." R.T. 40, 59-60.

21 Avery v. Georgia, 345 U.S. 559, 561 (1952); Hernandez, 347 U.S. at 481; Castaneda, 430 U.S. at 498 n. 19.

Moreover, Judge Karlton did exactly what the decisions of this Court and the drafters of § 2254(d) and the habeas rules envisioned. When, in 1963, the Committee on Habeas Corpus of the Judicial Conference considered what later became §2254 (d), state representatives proposed that all state court findings be accorded a conclusive presumption of correctness. The committee disagreed because it "would be wholly incompatible with the duty of Federal courts to determine Federal constitutional questions." H.R. Rep. No. 1384, 88th Cong., 2d Sess., 23 (May 6, 1964). The committee reviewed this Court's decisions, id. at 24-25, noting particularly the discussion in Brown v. Allen, 344 U.S. at 463-65, balancing the respect to be accorded state determinations of fact with the discretion of the district court to hold a hearing and develop the facts. Id. On that basis, it proposed what is now § 2254(d) to guide federal

habeas judges in determining when and how they are limited by the facts developed in state proceedings.[22]

The rules adopted by the Court and approved by Congress similarly contemplate that a federal habeas court will hear evidentiary facts not presented to the state courts. Thus, the rules provide for the appointment of counsel, Rule 8(c), the expansion of the record, Rule 7, the granting of discovery, Rule 6, and the holding of a hearing pursuant to the Townsend criteria. Rule 8(a); Adv. Comm. Note to Rule 8(a). The role of counsel --at least when properly performed -- is not just to make legal arguments, but also to develop and present facts that will

22 In considering the question whether material facts never presented to the state courts could nevertheless be presented in federal habeas, the Eleventh Circuit reviewed the legislative history of § 2254(d) and concluded: (1) that Congress essentially "codified" Townsend in adopting its criteria; and (2) that the "reason Congress ... remain[ed] silent on the sandbagging issue is ... the issue had already been decided by Townsend's deliberate bypass/inexcusable neglect criteria." Thomas v. Zant, 697 F.2d at 983-85.

persuade the judge to grant relief. The role of the judge in expanding the record under Rule 7 is to fill in facts missing from the state court record. Indeed, he is empowered to shape the record himself by propounding specific interrogatories. Subsection (b). Similarly, the point of discovery is to obtain new facts not previously known. And the hearing, pursuant to Rule 8 and Townsend, is to develop material facts not in the state court record.[23]

The handling of this case by Judge Karlton exemplifies what a concientious habeas judge is supposed to do under the rules. He reviewed the state court record and found it wanting. He ordered the parties to expand the record, propounding interrogatories designed to fill in the

23 It is noteworthy that the drafters of the rules never intended that exhaustion issues would be determined after discovery or at the time of the hearing; as they saw it, exhaustion was to be assessed on the basis of the claims set out in the petition and the state's return. See discussion in the Adv. Comm. Notes to Rules 4 & 5.

evidentiary gaps. He recognized that statistical analysis was relevant but lacking, and he asked the parties to produce it. He did not accept their showing at face value, but delved into it and performed his own statistical analysis. A construction of the exhaustion requirement that would condemn such fidelity to the "[exacting] duty of the Federal district court on habeas...," Townsend, 372 U.S. at 316, and instead imprison the federal habeas judge within the confines of the inquiries that the state courts saw fit to make, is plainly inconsistent with the habeas scheme.

Moreover, such an unsupported construction of the exhaustion requirement would demean the authority and responsibility that federal judges possess in any proceeding before them. It is their office to act as "the governor of the trial for the purposes of assuring its proper conduct and of determining questions of

law." Quercia v. United States, 289 U.S. 466, 469 (1933). Federal judges are obliged to think for themselves in applying federal law to the facts. Cuyler v. Sullivan, 446 U.S. 335, 34-42 (1980); Wainwright v. Sykes, 433 U.S. 72, 80 (1977). That obligation necessarily comprises within it the power to make such inquiries as he or she feels are needed to evaluate the record. Indeed, even, in a jury trial, a federal judge

> enjoys the prerogative, rising often to the standard of a duty, of eliciting those facts he deems necessary to a clear presentation of the issues.

United States v. Brandt, 196 F.2d 653, 655 (2d Cir. 1952).

C. No Policy of Comity or Federalism Requires the Repeated Return to the State Courts to Exhaust Specific Items of Evidence Relating to Claims Already Fairly Presented to Those Courts

"There is, of course, no requirement that petitioner file repetitious applications to state courts." Humphrey v. Cady, 405 U.S. 504, 516 n. 18 (1972). Once a

claim has fairly been presented to the state courts, requiring continued exhaustion for additional evidentiary items provides very little in the way of additional benefits. When, as here, the state courts have defaulted on their responsibililty properly to apply federal law, no reasonable benefit accrues by requiring a return visit with yet another fact supporting the original claim. Cf. Roberts v. LaVallee, 389 U.S. 40 (1967).

Indeed, to require exhaustion under these circumstances would subvert the intent behind § 2254(d). The purpose of that section was "to be a strong inducement to the States ... to provide adequate postconviction remedies and procedures...." S. Rep. No. 1791, 89th Cong., 2d Sess. (Oct. 18, 1966), 1966 U.S. Code Cong. & Ad. News 3663, 3672. That purpose is furthered by according a presumption of correctness to state court findings rendered under procedures that are "full,

fair, and adequate...." § 2254 (d)(6). But it is not furthered when states with inadequate procedures are afforded additional bites at the apple whenever the more adequate federal remedy turns up new evidence.

A new fact might justify return to state court on the same question presented when, through no fault of the state processes, a material, noncumulative fact is later discovered. This is not that case. But even in such a case, the costs of requiring a second visit to the state courts appear to outweigh any conceivable benefit. For there are real costs not only to the defendant but also to the judicial system. Judicial energy already expended in the federal district court is squandered. Final determination of the constitutional issue is put off; the finality of the original state court judgment is postponed yet further.

Requiring repeated exhaustion of this sort threatens the very "celebrated procedural tangles," Hart & Wechsler's THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1490 (2d ed. 1973), that occurred at the time of Ex parte Hawk, 321 U.S. 114 (1944). Because of the exhaustion requirement, it was not until 1952 that a federal court heard and granted Hawk's petition for the writ on his 1936 conviction. Hawk v. Hann, 103 F.Supp. 138 (D.Neb. 1952). Mr. Hillery has spent over 12 years in the state courts and 7 more in the federal courts. To require him to return to the state courts so that they can perform statistical analyses of the same evidence that was before them 23 years ago makes no sense.

This underscores the value of a prompt, full and fair determination of constitutional claims by the state courts in the first instance. But that was lacking here. The purpose of federal habeas is to provide a remedy in just this

circumstance. The imposition of additional exhaustion requirements would only subvert that remedy.

CONCLUSION

For the foregoing reasons, amicus respectfully submits that the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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